Neutral Citation: **[2024] UKUT 00346 (TCC)**

Case Number: UT/2022/000157

UPPER TRIBUNAL
(Tax and Chancery Chamber)

Rolls Building, 7 Rolls Buildings,
Fetter Lane, London, EC4A 1NL

VAT – EXCISE DUTIES – burden of proof in penalty cases where taxpayer challenges the assessment to tax – whether FTT's conclusions on facts inconsistent with the evidence – section 73 Value Added Tax Act 1994 – whether FTT erred in finding lack of best judgment – whether FTT erred in setting-aside assessment

Heard on: 2, 3, 4, 9 and 10 July 2024
Judgment date: 07 November 2024

Before

MR JUSTICE EDWIN JOHNSON

JUDGE ASHLEY GREENBANK

Between

THE COMMISSIONERS FOR HIS MAJESTY'S REVENUE AND CUSTOMS
Appellants

and

(1) SINTRA GLOBAL, INC

(2) PARUL MALDE

Respondents

Representation:

For the Appellants: Ben Hayhurst, counsel, and George Penny, counsel, instructed by the General Counsel and Solicitor to His Majesty's Revenue and Customs

For the Respondents: Alistair Webster KC and Simon Gurney, counsel, instructed by Brabners LLP

DECISION

INTRODUCTION

1. This is an appeal by the appellants, the Commissioners for His Majesty's Revenue and Customs ("HMRC"), against a decision of the First-tier Tribunal (the "FTT") dated 5 October 2022 (the "FTT Decision")[1].

2. In the FTT Decision[2], the FTT allowed the appeals of the respondents, Sintra Global Inc. ("Global") and Mr Parul Malde, against various decisions and assessments of HMRC relating to the non-payment of VAT and excise duties and related penalties, which HMRC say arose from the fraudulent diversion of alcohol into the UK and its subsequent sale in the UK by Global and Sintra SA ("SA"). Global is a company that is incorporated in Panama. SA is a company incorporated in Belize. It is HMRC's case that Global and SA were at all material times controlled by Mr Malde.

3. HMRC appeals against the FTT Decision with the permission of the FTT.

4. At the hearing, HMRC were represented by Mr Ben Hayhurst and Mr George Penny. Global and Mr Malde were represented by Alistair Webster KC and Mr Simon Gurney. We are grateful to counsel for their helpful submissions both orally and in writing and for their assistance during the hearing. We should express particular thanks to Mr Hayhurst (supported by Mr Penny) who, we understand, took over this case from John McGuinness KC at short notice due to a clash with Mr McGuinness's other court commitments. We are also grateful to the parties for arranging for a transcript of the hearing, at our request. We have found the transcript to be of great assistance in considering the submissions of counsel made at the hearing.

BACKGROUND

5. As we have described above, it is HMRC's case that SA and Global were involved in the fraudulent diversion of alcohol into the UK from the EU by a process known as "inward diversion fraud" resulting in unpaid VAT and excise duties. There is a description of inward diversion fraud in the Decision at FTT [7]. This description was taken from the decision of Judge Falk, as she then was, in *Dale Global Ltd v HMRC* [2018] UKFTT 363 (TC) at [50] to [52]. We set out those paragraphs for ease of reference below.

> 50. In outline, alcohol diversion fraud is used to evade excise duty and VAT through abuse of the Excise Movement and Control System ("EMCS"), which permits authorised warehouse keepers to move excise goods from warehouse to warehouse within the EU on behalf of account holders, in duty suspense. Any movement requires the generation of an Administrative Reference Code ("ARC") within the EMCS, which must travel with the goods. The system has operated in electronic form since January 2011. An ARC number will typically last for a few days, and expires when the load is recorded on the system by the receiving warehouse as having been being delivered.
>
> 51. Inward diversion fraud, which is the type of fraud potentially relevant in this case, operates as follows. Alcohol originating in the UK is supplied under duty suspension to tax warehouses on the near continent, principally in France, the Netherlands and Belgium (what follows uses the example of France). Once

[1] [2022] UKFTT 0365 (TC)
[2] In this decision notice, we refer to paragraphs in the FTT Decision in the format "FTT [xx]"

> in the tax warehouse they will usually change hands a number of times and will often be divided up before being reconstituted. A supply chain is set up with a purported end customer based in France. Some of the goods will be consigned back to the UK in duty suspense using an ARC number. This is the "cover load". Within the lifetime of the ARC number further consignments of goods of the same description will purportedly be released for consumption in France, attracting duty at low French rates, but will in fact be smuggled to the UK using the same ARC number. These are the "mirror loads", and this will carry on until the ARC number expires or one of the loads is intercepted by Customs, following which a new ARC number will be generated in a similar manner.
>
> 52. Mirror loads are typically sold immediately following their arrival in the UK for cash. This process is known as "slaughtering". The UK customers may create false paper trails to generate the impression that the goods were supplied to them legitimately.

6. In the FTT Decision, the FTT made extensive findings about the background to these appeals. We will refer to some of the detail of the FTT's findings later in this decision, but we have set out below a summary of the factual background in order to provide some context for our explanation of the various issues.

7. SA was incorporated in Belize on 10 June 2004 (FTT [132(3)]). At all material times, SA was controlled by Mr Malde.

8. SA engaged in trading goods, principally alcohol (wine and beer), between 2004 and 2011 (FTT [266]).

9. As part of its trade, SA purchased beer and wine in other EU member states from traders and wholesalers and sold those goods to Corkteck Limited ("Corkteck"), a UK registered alcohol trader, which was also controlled by Mr Malde (FTT [132)], [148], [266], [267]). In particular, between 2004 and 2007, SA purchased beer and wine from an unconnected company, York Wines Limited ("York Wines"), and sold those goods to Corkteck (FTT [266, [267]).

10. It is HMRC's case that the sales to Corkteck were the "cover loads" as part of an inward diversion fraud, and that SA owned the alcohol that was supplied to Corkteck in the UK. It is also HMRC's case that SA owned other alcohol which was sold in the UK as the "mirror loads", as evidenced by sums deposited in SA's bank accounts. The FTT found that SA made supplies of beer and wine in the UK (FTT [637]).

11. York Wines was subsequently the subject of a criminal investigation, referred to as "Operation Rust", which resulted in the conviction, amongst others, of its sole director, Mr Kevin Burrage, for cheating the public revenue as a result of involvement in inward and outward diversion fraud (FTT [132(24)], [132(25)], [299]).

12. Global was incorporated in Panama on 16 February 2011 (FTT [132(7)]). It is HMRC's case that Global was, at all material times, controlled by Mr Malde, although for reasons to which we shall return, the FTT made no finding of fact on that question.

13. At some point in 2011, Global took over the trade of SA and began trading in alcohol and other goods. As part of that trade, Global purchased alcohol from traders based in other EU member states (FTT [266], [300]). It sold alcohol to various purchasers. Some of the sales were made via Adrena sp. z o. o. ("Adrena"), a Polish company, to Corkteck in the UK. It is

also HMRC's case that Adrena was, at all material times, controlled by Mr Malde, although the FTT made no finding of fact on that question.

14. Once again, it is HMRC's case that the sales to Corkteck were "cover loads" as part of an inward diversion fraud, and that Global owned other alcohol which was sold in the UK as the relevant "mirror loads", as evidenced by sums deposited in Global's bank accounts. For reasons to which we shall return, the FTT found that there was insufficient evidence that Global was the owner of alcohol that was supplied in the UK (FTT [644]).

15. HMRC launched an investigation into the activities of SA and Global. As a result of that investigation, HMRC concluded that SA and Global were controlled by Mr Malde, and that SA and Global had evaded VAT and excise duties on alcohol supplied in the UK by falsely declaring that the goods were destined for other EU countries or were in duty suspension.

16. As a result of their enquiries, HMRC issued the following decisions and assessments to SA, Global and Mr Malde.

17. In relation to SA:

(1) In a letter dated 16 July 2015:

(a) HMRC informed SA that it was liable to be registered for VAT for the period from 1 December 2004 to 26 March 2012 under section 3 of and Schedule 1 to the Value Added Tax Act 1994 ("VATA");

(b) HMRC assessed the amount of VAT payable by SA in respect of that period in the amount of £11,749,664.22 by a "best judgment" assessment under section 73 VATA.

(2) In a letter dated 20 July 2015, HMRC issued an assessment to SA under section 12(1) Finance Act 1994 ("FA 1994") in respect of unpaid excise duty for the period from 1 December 2004 to 26 March 2012 in the amount of £19,583,773.

(3) In a letter dated 8 December 2016, HMRC informed SA that they intended to charge a civil evasion penalty under section 60 VATA in the amount of £11,162,180 as a result of SA's dishonest failure to register for VAT and to submit VAT returns for the period from 1 December 2004 to 26 March 2012 (the "civil evasion penalty"). HMRC informed SA that they intended to recover 100% of the civil evasion penalty from Mr Malde by notice under section 61 VATA. As a result, HMRC would not be seeking to recover any of the civil evasion penalty from SA.

18. In relation to Global:

(1) In a letter dated 16 July 2015:

(a) HMRC informed Global that it was liable to be registered for VAT between 1 April 2012 and 30 June 2015 under section 3 of and Schedule 1 to VATA;

(b) HMRC assessed the amount of VAT payable by Global in respect of that period in the amount of £8,921,064.64 under section 73 VATA;

(2) Also on 16 July 2015, HMRC issued a penalty assessment to Global under section 123 of and paragraph 1 of Schedule 41 to the Finance Act 2008 ("FA 2008") in the sum of £8,698,035.42 (the "registration penalty") in relation to the failure of Global to notify HMRC of its liability to register for VAT for the period from 1 April 2012 to 30 June 2015.

(3) In a letter dated 20 July 2015, HMRC issued an assessment to Global under section 12(1) FA 1994 in respect of unpaid excise duty for the period from 1 April 2012 to 30 June 2015 in the amount of £14,184,948.

(4) On 11 October 2017, HMRC issued a penalty assessment to Global under Schedule 24 to the Finance Act 2007 ("FA 2007") in the sum of £8,698,035.42 in relation to an inaccurate VAT return submitted on 12 October 2016 (the "inaccuracy penalty") (in the alternative to the registration penalty).

(5) On 21 December 2017, HMRC issued a penalty assessment to Global in the sum of £13,830,324 pursuant to paragraph 4 Schedule 41 FA 2008 for handling goods subject to unpaid excise duty (the "excise duty penalty").

19. In relation to Mr Malde:

(1) HMRC issued a personal liability notice ("PLN") to Mr Malde on 16 July 2015 pursuant to paragraph 22 Schedule 41 FA 2008, making Mr Malde liable for the registration penalty.

(2) HMRC issued a PLN to Mr Malde on 11 October 2017, pursuant to paragraph 19 of Schedule 24 to the Finance Act 2007 ("FA 2007"), in the alternative to the registration penalty, making Mr Malde liable for the inaccuracy penalty.

(3) HMRC issued a director's liability notice ("DLN"), dated 8 December 2016, to Mr Malde pursuant to section 61 VATA, making Mr Malde liable for the payment of the civil evasion penalty.

(4) HMRC issued a PLN to Mr Malde on 21 December 2017, pursuant to paragraph 22 Schedule 41 FA 2008, making Mr Malde liable for the excise duty penalty.

20. SA did not appeal against the decision that it was liable to be registered for VAT and the related VAT assessment (at [17(1)(a)] and [17(1)(b)] above), or the excise duty assessment (at [17(2)] above), or the civil evasion penalty (at [17(3)] above).

21. Global did not appeal against the inaccuracy penalty (at [18(4)] above) or the excise duty penalty (at [18(5)] above). Global appealed to the FTT against the other decisions and assessments.

22. Mr Malde appealed to the FTT against each of the PLNs and the DLN that were issued to him.

23. In its statements of case for each of the relevant appeals, HMRC pleaded that both SA and Global "were involved in alcohol diversion fraud; selling large quantities of beer and wine in the UK without accounting for VAT and excise duty".

24. Global's appeals against the VAT assessment (at [18(1)(b)] above) and the excise duty assessment (at [18(3)] above) could not be entertained by the FTT unless either Global deposited the disputed amount of tax or excise duty with HMRC or HMRC was satisfied or the FTT decided that the requirement to deposit that amount would cause Global to suffer hardship (section 83(3) and (3B) VATA and section 16(3) FA 1994). Global applied to the FTT for a decision that it would suffer hardship if it were required to deposit the tax or the duty. That application was refused by the FTT in a decision dated 26 October 2016[3].

25. As a result, the matters before the FTT were in summary as follows:

(1) the appeals of Global against:

(a) the decision of HMRC, contained in the letter dated 16 July 2015, that Global was liable to be registered for VAT between 1 April 2012 and 30 June 2015;

(b) the registration penalty issued by HMRC on 16 July 2015;

(2) the appeals of Mr Malde against:

(a) the PLN issued by HMRC on 16 July 2015 in respect of the registration penalty;

(b) the PLN issued by HMRC to Mr Malde on 11 October 2017 in respect of the inaccuracy penalty;

(c) the PLN issued by HMRC to Mr Malde on 21 December 2017 in respect of the excise duty penalty; and

(d) the DLN, dated 8 December 2016, issued by HMRC to Mr Malde pursuant to section 61 VATA in respect of the civil evasion penalty.

RELEVANT LEGISLATION

26. Before we turn to the FTT Decision, we will set out some of the legislative background.

VAT

27. As we have mentioned above, HMRC made the VAT assessments against SA and Global under section 73(1) VATA. Section 73 permits HMRC to make an assessment "to the best of their judgment" where, inter alia, a taxpayer has failed to make returns as required by VATA. At all material times, section 73(1) VATA was in the following form:

> (1) 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.

[3] [2016] UKFTT 0726 (TC)

28. The civil evasion penalty levied against SA was issued under section 60 VATA. At the relevant time, section 60 VATA was, so far as relevant, in the following form:

> **60.— VAT evasion: conduct involving dishonesty.**
>
> (1) In any case where—
>
> (a) for the purpose of evading VAT, a person does any act or omits to take any action, and
>
> (b) his conduct involves dishonesty (whether or not it is such as to give rise to criminal liability),
>
> he shall be liable, subject to subsection (6) below, to a penalty equal to the amount of VAT evaded or, as the case may be, sought to be evaded, by his conduct.
>
> …
>
> (7) On an appeal against an assessment to a penalty under this section, the burden of proof as to the matters specified in subsection (1)(a) and (b) above shall lie upon the Commissioners.

29. HMRC issued a DLN to Mr Malde under section 61 VATA in respect of the civil evasion penalty issued to SA. Under section 61, HMRC was able to issue a DLN to recover the amount of a penalty assessed on a company under section 60 VATA (or a proportion of such a penalty) from a director or managing officer of the company in certain circumstances. At the relevant time, it was in the following form:

> **61.— VAT evasion: liability of directors etc.**
>
> (1) Where it appears to the Commissioners—
>
> (a) that a body corporate is liable to a penalty under section 60, and
>
> (b) that the conduct giving rise to that penalty is, in whole or in part, attributable to the dishonesty of a person who is, or at the material time was, a director or managing officer of the body corporate (a "named officer"),
>
> the Commissioners may serve a notice under this section on the body corporate and on the named officer.
>
> (2) A notice under this section shall state—
>
> (a) the amount of the penalty referred to in subsection (1)(a) above ("the basic penalty"), and
>
> (b) that the Commissioners propose, in accordance with this section, to recover from the named officer such portion (which may be the whole) of the basic penalty as is specified in the notice.
>
> (3) Where a notice is served under this section, the portion of the basic penalty specified in the notice shall be recoverable from the named officer as if he were personally liable under section 60 to a penalty which corresponds to that portion; and the amount of that penalty may be assessed and notified to him accordingly under section 76.
>
> (4) Where a notice is served under this section—
>
> (a) the amount which, under section 76, may be assessed as the amount due by way of penalty from the body corporate shall be only so much (if any) of the basic penalty as is not assessed on and notified to a named officer by virtue of subsection (3) above; and

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

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

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

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

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

30. Section 60 and section 61 VATA were repealed by FA 2007, subject to certain transitional rules. The former penalty regime was replaced by a new regime found in Schedule 24 FA 2007 and Schedule 41 FA 2008. HMRC issued the registration penalty and the inaccuracy penalty to Global and the relevant PLNs in respect of them to Mr Malde under Schedule 41 FA 2008 and Schedule 24 FA 2007.

31. Under paragraph 1 Schedule 41 FA 2008, a penalty is payable by a person where that person fails to comply with a "relevant obligation". A relevant obligation is an obligation listed in the table in paragraph 1. The table includes, in relation to VAT:

> "Obligations under paragraphs 5, 6, 7 and 14(2) and (3) of Schedule 1 to VATA 1994 (obligations to notify liability to register and notify material change in nature of supplies made by person exempted from registration)."

Paragraphs 5, 6 and 7 Schedule 1 VATA 1994 are the obligations on persons who make taxable supplies or who expect to make taxable supplies with a value in excess of the relevant threshold to notify HMRC of a liability to register for VAT.

32. Under paragraph 22 Schedule 41 FA 2008, HMRC may issue a PLN to recover the amount of a penalty (or a proportion of it) payable by a company under paragraph 1 Schedule 41 (and certain other provisions of Schedule 41) from an officer of the company in certain circumstances. At all material times, paragraph 22 was in the following form, so far as relevant:

22

(1) Where a penalty under any of paragraphs 1, 2, 3(1) and 4 is payable by a company for a deliberate act or failure 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.

(2) Sub-paragraph (1) does not allow HMRC to recover more than 100% of a penalty.

…

33. Under paragraph 1 Schedule 24 FA 2007, a penalty is payable by a person where that person gives HMRC a document of a kind listed in the table in sub-paragraph (4) of paragraph 1, that document contains an inaccuracy, and the inaccuracy was careless or deliberate on that person's part. The table in sub-paragraph (4) includes in respect of VAT:

> VAT return under regulations made under paragraph 2 of Schedule 11 to VATA 1994.

34. Under paragraph 19 Schedule 24 FA 2007, HMRC may issue a PLN to recover the amount of a penalty payable by a company under paragraph 1 Schedule 24 for a deliberate inaccuracy (or a proportion of it) from an officer of the company in certain circumstances. At all material times, paragraph 19 was in the following form, so far as relevant:

> **19 Companies: officers' liability**
>
> (1) Where a penalty under paragraph 1 is payable by a company for a deliberate inaccuracy which was attributable to an officer of the company, 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.
>
> (2) Sub-paragraph (1) does not allow HMRC to recover more than 100% of a penalty.

Excise duties

35. HMRC made the excise duty assessments against SA and Global under section 12(1) FA 1994. At all material times, section 12(1) VATA was in the following form:

> **12.— Assessments to excise duty.**
>
> (1) Subject to subsection (4) below, where it appears to the Commissioners—
>
> (a) that any person is a person from whom any amount has become due in respect of any duty of excise; and
>
> (b) that there has been a default falling within subsection (2) below,
>
> the Commissioners may assess the amount of duty due from that person to the best of their judgment and notify that amount to that person or his representative.
>
> …

36. HMRC issued the excise duty penalty to Global under Schedule 41 FA 2008. Under paragraph 4 Schedule 41 FA 2008, a penalty is payable by a person, who acquires excise goods after the duty point for the goods, where the duty has not been paid. Paragraph 4 was in the following form at all material times:

> **4**
>
> (1) A penalty is payable by a person (P) where–
>
> (a) after the excise duty point for any goods which are chargeable with a duty of excise, P acquires possession of the goods or is concerned in carrying, removing, depositing, keeping or otherwise dealing with the goods, and
>
> (b) at the time when P acquires possession of the goods or is so concerned, a payment of duty on the goods is outstanding and has not been deferred.
>
> (2) In sub-paragraph (1)–

> "excise duty point" has the meaning given by section 1 of F(No.2)A 1992, and
>
> "goods" has the meaning given by section 1(1) of CEMA 1979.…

37. The relevant PLN was issued to Mr Malde under paragraph 22 Schedule 41 FA 2008, which we have set out at [32] above.

THE FTT DECISION

38. The FTT Decision sets out in considerable detail and at some length a description of the evidence before the FTT, the FTT's views of that evidence and the witnesses, the FTT's findings of fact, and details of HMRC's investigation, before turning to the issues before the FTT and the FTT's conclusions on them. We will address some aspects of the FTT Decision in more detail when we turn to the various grounds of appeal. However, for present purposes, we will set out a brief summary of the FTT Decision in order to provide some background to our discussion of the issues.

39. The FTT identified the issues before it as follows (FTT [4]):

> 4. It is agreed that the following issues arise in these appeals:
>
> (1) Whether Mr Malde was the controlling mind behind SA and Global;
>
> (2) Whether SA and Global diverted alcohol into the United Kingdom and sold the stock in the United Kingdom thereby giving rise to VAT and excise liabilities (it is not disputed that SA and Global were not VAT registered in the United Kingdom and did not account for any VAT or any excise duty);
>
> (3) The quantum of the assessments, the Company penalty [i.e. the registration penalty], the PLNs and DLN; and
>
> (4) Whether the PLN in respect of excise duty… was issued in time.

40. The FTT began its decision by setting out an extensive summary of the evidence before it (FTT [8]-[131]). This summary included an outline of the evidence provided by the witnesses who had appeared before the FTT.

> (1) There were 24 officers of HMRC who gave witness evidence and who were cross-examined on their statements. In addition, the witness statements of a further 21 HMRC officers were not challenged, and their statements were admitted into evidence (FTT [108]).
>
> (2) The FTT criticised the evidence of some of the witnesses who appeared on behalf of HMRC. For example, the FTT was critical of the evidence of Mr James Dibb, an officer in HMRC's Fraud Investigation Office – Organised Crime – Civil MTIC/Alcohol Team. Mr Dibb had undertaken much of the underlying analysis of how SA and Global operated. In the FTT's view his evidence was "inconsistent to the extent of misleading" (FTT [27]).
>
> (3) The FTT reserved particular criticism for the evidence of Mr Dean Foster. Mr Foster was also a member of HMRC's Fraud Investigation Service, Organised Crime – Civil MTIC/Alcohol Team. The FTT found that Mr Foster was responsible for the decisions which were the subject of most of the appeals, with the exception of the excise duty assessments (FTT [80]). The FTT found that Mr Foster was "unable to answer our questions in relation to many of the topics he had addressed in his first witness

statement" (FTT [52]) and that his answers to questions were "frequently evasive, often obstructive, and on occasions inconsistent, contradictory and misleading" (FTT [53]).

(4) The witnesses who appeared before the FTT also included Mr Malde, and two other witnesses, Mr Andrew Quay and Mr Steven Simmonite, Mr Malde's tax adviser, who gave evidence on behalf of Global and Mr Malde. Another witness, Mr Eric van de Vondel, produced a witness statement, but did not appear in person. The FTT accepted his evidence albeit with reservations as to the weight that could be afforded to it (FTT [107]).

(5) The FTT was also critical of Mr Malde's evidence. It found much of his evidence was "inconsistent with statements that he had previously made in interviews and/or correspondence and as such casts doubt on its veracity" (FTT [83]).

41. The FTT set out its findings of fact in a lengthy section, which begins at FTT [132]. This section includes a limited agreed statement of facts followed by a description of the activities of the various companies over the relevant period. This description includes:

(1) details of various seizures of alcohol by the UK Border Force between 1 July 2011 and 5 November 2013 (FTT [159]-[175]), noting, in relation to those seizures, that SA was designated as the owner of the relevant goods up to a date in 2011, and from 20 December 2011, Adrena was identified as the owner of the relevant goods (FTT [170]-[174]);

(2) a description of the police investigation in relation to Operation Rust in relation to which Mr Malde was interviewed by the police (FTT [185]-[210]);

(3) a description of the formation and operations of SA and Global in relevant periods, including Mr Malde's authority to act on behalf of both companies and the operation of their bank accounts (FTT [212]-[265]);

(4) details of the trading arrangements of both SA and Global in the relevant periods, as derived from HMRC's enquiries (FTT [266]-[354]);

(5) details of HMRC's enquiries into commission payments made by SA and Global to Mr Malde between 24 March 2011 and 21 March 2014 in an aggregate sum of £2,991,794.84 (FTT [355]-[360]);

(6) a description of evidence drawn from various criminal investigations including:

(a) evidence from Operation Rust relating to the sale of alcohol by York Wines to SA (FTT [404]-[413]);

(b) evidence from "Operation Banjax" – which resulted in the convictions of ten individuals for money laundering the proceeds of diversion frauds – which, HMRC say, relates to payments made to and by Global and other companies controlled by Mr Malde (FTT [414]-[436]);

(c) evidence from "Operation Epsom", a fraud "predicated on the sale of illicit alcohol" (FTT [437]-[456]);

(7) details of interviews given by Mr Malde to HMRC on 1 December 2009, 10 December 2013, and 4 December 2015, the latter of which took place under the Practice Note 160 procedure and was also attended, amongst others, by Mr Simmonite and by Mr Malde's solicitors (FTT [457]-[485]); and

(8) a summary of the evidence given by Mr Simmonite relating to his analysis of the SAGE records of York Wines, on which HMRC rely in relation to the assessments on SA (FTT [486]-[510]).

42. The FTT then turned to the various assessments made by HMRC on SA, Global and Mr Malde. We will return to the detail of the manner in which HMRC computed the sums in the assessments and the penalty notices later in this decision. For present purposes, the following summary will suffice.

(1) In the absence of information from SA, Mr Foster computed the VAT liability of SA for the period 1 December 2004 to 26 March 2012 for the purposes of the assessment under section 73 VATA in the following manner:

(a) For periods for which this information was available, Mr Foster computed the ratio which the purchases of alcohol made by SA from York Wines (as taken from SA's bank statements) bore to the total sales made by York Wines to SA as shown in its SAGE records (referred to as the "cash/bank ratio").

(b) Mr Foster applied that cash/bank ratio to the purchases of alcohol made by SA (as taken from SA's bank statements) for other periods for which the SAGE records were not available to produce a figure of total purchases by SA for all periods.

(c) Mr Foster applied a mark-up of 19.61% to that total figure to produce a total value of sales from which to calculate the VAT due. The mark-up was derived from the average gross profit ratio for wholesalers and cash and carry businesses provided by HMRC's Business Information Unit. No allowance was given for input tax.

This calculation produced a figure of VAT due of £11,749,664 (FTT [524]-[531]).

(2) In the absence of information from Global, Mr Foster computed the VAT liability of Global for the period 1 May 2012 to 13 May 2014 for the purposes of the assessment under section 73 VATA by:

(a) applying the same cash/bank ratio to the movements on the cash at bank figures derived from Global's bank statements and, in some cases, allowing a discount of 10% for bank charges and non-trading expenditure, to produce a figure for the purchases of alcohol;

(b) applying the same mark-up of 19.61% to that total figure to produce a total value of sales from which to calculate the VAT due. No allowance was given for input tax.

This calculation produced a figure of VAT due of £8,921,064 (FTT [531]-[532]).

(3) The civil evasion penalty on SA, the registration penalty on Global and the related DLN and the PLN were all calculated by reference to these figures. Mr Malde was treated by HMRC as a director or officer of SA and Global and the failures to register as being attributable to him (FTT [543]-[548]).

(4) The inaccuracy penalty and the related PLN were issued by HMRC when Mr Malde submitted a "nil" VAT return for Global for the period 1 July 2012 to 30 June 2015 (FTT [549]).

(5) The excise duty assessments were based entirely on the VAT assessments (FTT [554]).

43. Having set out the procedural issues and summarized the applicable legislation, the FTT addressed two preliminary issues before turning to the issues that it had identified as being before it: the first of these was the burden of proof; the second was the order in which it proposed to address the relevant issues.

44. As regards the burden of proof, the FTT noted that the "general position" on tax appeals was that it was "for the taxpayer to establish the correct amount of tax due" and that "this burden of proof does not change merely because allegations of fraud may be involved" (FTT [593]). The FTT cited the judgment of Mustill LJ in *Brady (Inspector of Taxes) v Group Lotus Car Companies plc* [1987] 3 All ER 1050 ("*Brady*") in support of this principle.

45. The FTT noted two exceptions to this general position.

(1) The first was where "fraud was an essential element of the basis of assessment" as in the case of missing trader intra-community ("MTIC") appeals based on the *Kittel* principle or "where fraud or dishonesty is pleaded with full particularity". In such cases, the burden was on HMRC (FTT [593]-[594]).

(2) The second was that HMRC bore the burden of proving that a person is liable to a penalty on the grounds that Article 6 of the European Convention on Human Rights ("ECHR") was engaged (FTT [595]).

46. On that basis, the FTT concluded that it was for HMRC "to establish the allegations before the tribunal and the liabilities to penalties" (FTT [596]), with the exception of issues of the quantum of the liability for the purposes of the best judgment assessments, which the FTT proposed to address separately.

47. The FTT then addressed the order in which it intended to approach the issues that were before it. It concluded – after accepting a submission from Mr Webster KC that to do otherwise would, in effect, reverse the burden of proof – that it was appropriate to determine the questions as to whether SA and Global diverted alcohol to and sold alcohol in the UK (which the FTT referred to as the "place of supply issue") before turning to the question of whether Mr Malde was the controlling mind behind SA and Global (FTT [598]-[605]).

48. As regards the main issues before it, the FTT reached the following conclusions.

(1) SA was the owner of alcohol that was smuggled into the UK and sold in the UK between 2004 and 2011 (FTT [637]).

There is no express finding to this effect, but we take it as implicit in this conclusion that supplies of alcohol were made by SA in the UK in relevant periods.

(2) In "the absence of evidence that Global was the owner of goods that were supplied in the UK", Global was not liable to be registered for VAT in the relevant periods (FTT [644]).

As we understand it, by this finding, the FTT decided that HMRC had not discharged its burden of proof to show that Global made supplies of alcohol in the UK in the relevant periods. It followed from this conclusion that the appeals against assessments that HMRC had issued to Global (in respect of both VAT and excise duties) and the related assessments and liability notices issued to Mr Malde were allowed. This dealt with all the decisions, assessments and PLNs with the exception of the DLN.

(3) Given its conclusion on the question of place of supply it was not necessary for the FTT to determine whether Mr Malde was the controlling mind behind Global (FTT [645]).

(4) Mr Malde controlled SA in all relevant periods (FTT [649]).

(5) HMRC and, in particular, Mr Foster did not "fairly consider" the evidence before them and accordingly the assessment made against SA was not made to the best of their judgment as required by section 73 VATA. The FTT considered that the failings of HMRC and Mr Foster in this regard were of such a degree that, had the assessment been appealed by SA, it would have been necessary to set it aside in its entirety "in the interests of justice" (FTT [664]).

The effect of this conclusion was that the related DLN issued to Mr Malde also fell away.

49. As a consequence of these findings, the FTT allowed Global and Mr Malde's appeals against all the decisions and assessments (FTT [666]). The FTT did not need to determine whether the PLN issued to Mr Malde in respect of the excise duty penalty had been issued in time and it did not do so (FTT [665]).

50. The FTT commented (at FTT [667]):

> 667. Finally, we would adopt the following observation of Mr Webster and Mr Gurney from their closing written submissions on behalf the appellants that:
>
> > "… there can be no criticism of the fact that the Respondents' decided to investigate Mr Malde, given his role in the formation of the offshore entities and their bank accounts. They generated suspicion, and that suspicion was amplified by Mr Malde's reluctance to volunteer information (born, as it was, out of distrust of HMRC resulting from previous problems with them). The problem is that much of the above demonstrates – and clearly demonstrates, in our submission – that suspicion generated a fixed view as to the involvement of Mr Malde and a determination to make him pay which blinded the officers to the defects in their analysis. A fixed view was arrived at, despite the difficulties with the evidence, and has been persisted with from relatively early in the investigation."

> To this we would add that had HMRC, and Mr Foster in particular, taken a less myopic approach to this case, particularly with regard to Mr Malde, from the commencement of their investigations we may well have reached entirely different conclusions.

THE GROUNDS OF APPEAL

51. On 25 November 2022, HMRC made an in-time application for permission to appeal against the FTT Decision on six grounds. The grounds were set out in detail in the application. In summary, they were as follows:

> (1) the FTT erred in law when it concluded "in general terms" that the burden of proof fell on HMRC to establish the allegations before the tribunal and the liabilities to penalties (FTT [593]-[596]);
>
> (2) the FTT erred in law in its approach to the issues and evidence by compartmentalizing factors rather than examining the totality of the evidence;
>
> (3) the FTT's conclusion (at FTT [643]) that Adrena "supplied" the alcohol in the UK (and that Global did not) was demonstrably inconsistent with the underlying evidence;
>
> (4) the FTT erred in law in concluding that there was a breach of the "best of their judgment" requirement in section 73 VATA (in relation to the liability of SA, which underlies the civil evasion penalty);
>
> (5) in the alternative to (4), even if there had been a breach of the "best of their judgment" requirement in relation to some elements of the assessment, it was an error of law to set aside the whole assessment rather than correcting the amount to a fair figure (FTT [662]-[663]); and
>
> (6) the FTT failed to give any or adequate reasons with respect to a number of key matters set out in the application.

52. The FTT granted permission to appeal on all grounds on 9 December 2022.

GROUND 1: THE BURDEN OF PROOF

53. Ground 1 is that the FTT erred in law when it concluded that the burden of proof fell on HMRC "to establish the allegations before the tribunal and the liabilities to penalties".

Background

54. As we have mentioned above, the question of where the burden of proof lies assumes some significance in this case. This is because of the manner in which the FTT reached its conclusion that Global was not liable to be registered for VAT in the UK.

55. The relevant passage in the FTT Decision is at FTT [642]-[644] where the FTT says this:

> 642. … even if Global was knowingly involved in illegality by selling alcohol in the European Union to United Kingdom traders, or to an OCG that Global knew intended to smuggle those goods, that is not enough. It is a too broad brush approach. Although HMRC contend that Mr Malde controlled SA and Global and through them Golden Apple, Galac and Adrena and made non-commercial arrangements, in that he is effectively selling to himself, as Mr

> Webster contends, the choice of SA and Global as the taxable entities is dependent upon a decision to ignore the involvement of the other corporate entities and the reality is that either Golden Apple, Galac and Adrena existed and played their role or, contrary to the evidence, they had no legal existence and can therefore be disregarded.
>
> 643. While there is no evidence before us as to the company law of any of the jurisdictions in which these various companies were established or operated, there is no suggestion that the theory of the effect of incorporation is different and no evidence to support that either. Therefore, it is necessary to treat the various corporate entities as having their own legal identity which cannot be disregarded. Accordingly, and applying the same process as we did with SA, it would appear that Adrena, not Global, owned the alcohol seized in the United Kingdom and that it supplied the alcohol that was sold.
>
> 644. As such, and in the absence of evidence that Global was the owner of the goods that were supplied in the United Kingdom we are unable to find that it was liable to be registered for VAT.

56. HMRC dispute much of the reasoning in this passage. We will address their other points later in this decision. However, as can be seen from this passage, the FTT relied upon HMRC's failure to prove that Global owned any of the goods that were sold in the UK in determining that Global had not made taxable supplies in the UK and so was not liable to register for VAT in the UK. That conclusion was sufficient to determine all the appeals in favour of Global and Mr Malde, with the exception of Mr Malde's appeal against the DLN.

The FTT Decision

57. The FTT commenced the relevant section of the FTT Decision by noting that the "general position" on tax appeals was that it was "for the taxpayer to establish the correct amount of tax due" and that "this burden of proof does not change merely because allegations of fraud may be involved". The FTT said this (at FTT [593]):

> 593. In tax appeals the general position, as is clear from the decision of the Court of Appeal in *Awards Drinks Limited v HMRC* [2021] STC 1590 at [13] (citing Carnwath LJ, as he then was, at [69] in *Khan (t/a Greyhound Cleaners) v HMRC* [2006] STC 1167), is that it is for the taxpayer to establish the correct amount of tax due and that this burden of proof does not change merely because allegations of fraud may be involved (see eg *Brady (Inspector of Taxes) v Group Lotus Car Companies plc* [1987] STC 635 at 642… per Mustill LJ).

58. The FTT went on to identify two exceptions to this general rule.

(1) The first was where "a connection to fraud is an essential element of the basis of assessment" such as in the case of MTIC appeals based on the *Kittel* principle[4] (FTT [594]).

(2) The second was where fraud or dishonesty is pleaded by HMRC with full particularity (FTT [594]):

> "In addition, in any case where fraud or dishonesty is pleaded with full particularity, as in the present case, HMRC adopts the burden of proof in

[4] See the decision of the European Court of Justice in *Axel Kittel v Belgian State* (C-439/04) [2008] STC 1537

> relation to those allegations which should not be made without evidence by which the allegations can apparently be justified."

The FTT referred to the judgment of Carnwath LJ, as the then was, in *Khan (t/a Greyhound Dry Cleaners) v Customs & Excise Commissioners* [2006] EWCA Civ 89 ("*Khan*") (at *Khan* [73]-[74]) as authority for this exception.

59. The FTT then drew a contrast with cases involving a penalty. In such cases, HMRC bore the burden of proving that a person was liable to a penalty on the grounds that Article 6 of the European Convention on Human Rights ("ECHR") was engaged. The FTT said this (at FTT [595]):

> 595. In contrast to the general rule for tax assessments, it has also long been accepted that HMRC bears the burden of proving that a person is liable to a penalty (see e.g. *King v Walden* [2001] STC 822 at [71] and *Massey v HMRC* [2016] STC at [58]). In penalty proceedings, which are punitive and do not concern liability to tax, and which engage Article 6 ECHR (right to a fair trial), the normal common law on burden of proof applies, i.e. that the person who makes the allegation must prove it. It is therefore for HMRC to prove the default which is the trigger for the penalty.

60. On that basis, the FTT concluded that it was for HMRC "to establish the allegations before the tribunal and the liabilities to penalties" (FTT [596]), with the exception of issues of the quantum of the liability for the purposes of the best judgment assessments (which would inform the quantum of any penalty), which the FTT proposed to address separately. As we understand it, the FTT reached this conclusion because:

> (1) in the present case, HMRC had pleaded a particularized case of fraud against Global and Mr Malde, and so, in relation to Global's appeal against HMRC's decision that Global was liable to be registered for VAT, the burden of proof was on HMRC;
>
> (2) all the other appeals were penalty appeals, and so, once again, the burden of proof was on HMRC.

The parties' submissions in outline

61. HMRC disputes this reasoning; the respondents support it. In summary, the parties' submissions are as follows.

62. For HMRC, Mr Hayhurst submits that there is a strand of authorities which supports the proposition that in all tax cases (including appeals against penalty assessments) the burden is on the taxpayer except where: (i) the statute expressly or impliedly places the burden of proof on HMRC or (ii) where the liability for which HMRC contends requires proof of particular knowledge or state of mind on the part of the taxpayer. The clearest example of the latter exception is the requirement on HMRC to show that the taxpayer knew or should have known of a connection with fraud in relation to cases within the *Kittel* principle.

63. Mr Hayhurst says that, in addition to *Khan*, this strand of authorities includes the cases of *Brady*, *Ingenious Games LLP v HMRC* [2015] UKUT 0105 (TCC) ("*Ingenious*"), and *Awards Drinks Limited v HMRC* [2021] EWCA Civ 1235 ("*Awards*").

64. For the respondents, Mr Webster KC submits:

(1) In relation to tax assessments, the burden of proof is on the taxpayer to show that the relevant assessment is wrong and to establish the correct amount of tax that is due.

(2) There is an exception to that general principle where dishonesty or fraud is expressly alleged by HMRC against a taxpayer. In such cases, HMRC must plead, particularize and prove dishonesty or fraud in the same way that it would have to do so in civil proceedings (*E Buyer UK Ltd v HMRC* [2017] EWCA Civ 1416 ("*E Buyer*") per Sir Geoffrey Vos C, as he then was, at [98]).

(3) Where a penalty is imposed upon a taxpayer, HMRC bears the burden of proving liability to that penalty, unless an exception to Article 6 ECHR can be justified (*Euro Wines v HMRC* [2018] EWCA Civ 46 ("*Euro Wines*")).

(4) Although it is possible to justify an exception to the application of Article 6 ECHR in some cases, given the nature of the appeals in this case, it would not be appropriate to make an exception. The FTT was correct to impose the burden of proof on HMRC.

The relevant case law principles

65. We have been referred by the parties to a significant body of case law in relation to this ground of appeal. We have taken the parties' submissions on those authorities into account, but do not intend to comment on all of them in this decision. It will be sufficient for us to focus on the leading authorities.

66. In addition, notwithstanding Mr Hayhurst's submissions that there is a general principle applicable to both proceedings in appeals against tax assessments as well as penalty assessments, we find it more straightforward to approach this ground of appeal by reviewing separately the principles that can be derived from the case law authorities in relation to appeals against tax assessments themselves before turning to those which can be derived from the case law authorities in relation to appeals against penalty assessments.

The burden of proof in tax appeals

67. We will begin with the position in relation to appeals against tax assessments (not including penalties).

68. Subject to certain exceptions, to which we will return below, on an appeal against an assessment to tax, the general rule is that, unless the statute expressly or impliedly provides otherwise, the burden is on the taxpayer to show that the assessment is wrong and to establish the correct amount of tax that is due (see, for example, *T Haythornthwaite & Sons Limited v Kelly (Inspector of Taxes)* [1927] 11 TC 657, *Tynewydd Labour Working Men's Club and Institute Limited v Customs & Excise Commissioners* [1979] STC 570 ("*Tynewydd*"), *Grunwick Processing Laboratories Ltd v Customs & Excise Commissioners* [1987] STC 357).

69. The rationale for this rule is variously expressed in the cases. In some cases, it is referred to as a product of the statutory rules that an assessment will stand good unless it is successfully appealed (such as in section 50(6) Taxes Management Act 1970). In others, it is expressed as an exception to the general principle that the person who asserts must prove on the grounds that the taxpayer is usually in a position to produce the evidence that he or she needs to prove his or her case (see, for example, *Tynewydd* at page 580). In *Khan*, Carnwath LJ suggested that the rule may be a product of a broader principle that, subject to certain exceptions, the

burden is on an appellant in the case of an appeal against an enforcement action taken by public authority (*Khan* [70]).

70. There are some well-established exceptions to this general rule. These are typically cases where a particular state of mind or particular conduct on the part of the taxpayer is an essential element of the liability for which HMRC contends. So, for example, in MTIC cases, which rely on the *Kittel* principle, it is for HMRC to show that the taxpayer knew or should have known that the transactions in which he or she was involved were connected to fraud (*Mobilx Ltd and others v HMRC* [2010] EWCA Civ 517 ("*Mobilx*") per Moses LJ at [81]). HMRC also have the burden of proving an allegation that a transaction is a sham (*Hitch and others v Stone (Inspector of Taxes)* [2001] EWCA Civ 63 per Arden LJ at [32]) or that transactions involve an abuse of law in order to invoke the principles in *Halifax plc and others v Commissioners of Customs & Excise* (C-255-02) ("*Halifax*") in VAT cases (*Massey (t/a Hilden Park Partnership) v HMRC* [2015] UKUT 405 (TCC) ("*Massey*") at [60]).

71. Mr Webster KC, for the respondents, sought to persuade us of a more general principle consistent with the FTT's conclusion that HMRC adopts the burden of proof in any case where "fraud or dishonesty is pleaded with full particularity" (FTT [594]). Mr Webster submitted that in this case, HMRC had pleaded fraud and so HMRC assumed the burden of proof. This was the case even if the relevant liability to tax did not require proof of fraud or dishonesty.

72. In support of his submission, Mr Webster KC referred us to the decision of the Court of Appeal in *E Buyer*. In *E Buyer*, HMRC appealed against two decisions of the Upper Tribunal to the effect that HMRC was required to plead dishonesty against the respondents in MTIC fraud cases. The Court of Appeal allowed HMRC's appeals. Sir Geoffrey Vos C summarized his conclusions in the following way (at *E Buyer* [90]):

> 90. Finally, if a summary of the applicable law is required along the lines of paragraphs 86 and 87 of the UT's decision, I would simply summarise the principles as follows:-
>
> i) The test promulgated by the CJEU in *Kittel* was whether the taxpayer knew or should have known that he was taking part in a transaction connected with fraudulent evasion of VAT.
>
> ii) Ultimately the question in every *Kittel* case is whether HMRC has established that the test has been met. The test is to be applied in accordance with the guidance given by the Court of Appeal in *Mobilx* and *Fonecomp*.
>
> iii) It is not relevant for the FTT to determine whether the conduct alleged by HMRC might amount to dishonesty or fraud by the taxpayer, unless dishonesty or fraud is expressly alleged by HMRC against the taxpayer. If it is, then that dishonesty or fraud must be pleaded, particularised and proved in the same way as it would have to be in civil proceedings in the High Court.
>
> iv) In all *Kittel* cases, HMRC must give properly informative particulars of the allegations of both actual and constructive knowledge by the taxpayer.

73. He continued (at *E Buyer* [98]):

> 98. The main point in this case was not, as the taxpayers suggested a simple pleading question. The UT failed, I think, to identify the basic error that Judge Mosedale had made in the Citibank case, where she said, in effect, that making

> a first limb *Kittel* allegation required a plea of dishonesty. It does not; even if in some cases, the findings of knowledge made by the F-tT could have led the F-tT to uphold a plea of dishonesty had it been made. HMRC is entitled to stop short of alleging dishonesty and content itself with pleading, particularising and proving first limb *Kittel* knowledge. If, however, HMRC do expressly allege dishonesty, they will be required to comply with the normal rules of pleading and disclosure applicable to such cases. In future, it might be helpful in these cases for HMRC to say expressly in their statements of case whether or not they set out to prove the dishonesty of the appellant taxpayer.

74. Hallett LJ makes a similar point in her judgment (at *E Buyer* [103]).

75. Mr Webster also relied on the decision of the Upper Tribunal in *Massey*. *Massey* concerned arrangements for the running of a golf course, which HMRC asserted constituted an abuse of law under the principles in *Halifax*. On the question of the burden of proof, the Upper Tribunal said this (at *Massey* [58] – [59]):

> 58. In tax appeals, it has long been established that the taxpayer has the burden of showing that the assessment issued or decision reached by HMRC is wrong (see *T Haythornthwaite & Sons Limited v Kelly (Inspector of Taxes)* (1927) 11 TC 657 for direct tax appeals and *Tynewydd Labour Working Men's Club* for appeals relating to VAT). In cases where fraud is alleged, it is accepted that HMRC bears the burden of proof. In *Mobilx Ltd and others v HMRC* [2010] EWCA Civ 517, [2010] STC 1436 Moses LJ stated that HMRC have the burden of proof in MTIC fraud cases in the following terms:
>
> > "[81] …It is plain that if HMRC wishes to assert that a trader's state of knowledge [of connection to fraud] was such that his purchase is outwith the scope of the right to deduct it must prove that assertion. No sensible argument was advanced to the contrary."
>
> 59. Fraud is not the only situation where HMRC bear the burden of proof in tax appeals. As Mr Gordon observed, HMRC have the onus of proving an allegation that a transaction is a sham: see *Hitch and others v Stone (Inspector of Taxes)* [2001] EWCA Civ 63, [2001] STC 214 per Arden LJ at [32]. It has also long been accepted that HMRC bear the burden of proving that a person is liable to a penalty for late submission of a return or late payment of tax whereas the taxpayer bears the burden of establishing that he or she has a reasonable excuse.

76. The Upper Tribunal concluded (at *Massey* [60])

> 60. In determining who bears the burden of proof in an appeal where abuse of law is alleged, it is necessary to consider which party substantially asserts that there is or has been an abuse. As discussed above, it is the nature of an abusive arrangement that the taxpayer's appeal would succeed on the purely formal application of the legislation. The appeal will only fail if it can be shown that there is an abuse, i.e. the resulting tax advantage is contrary to the VAT Directives and the essential aim of the transactions is to obtain a tax advantage. If abuse were not alleged or, having been alleged, cannot be established then the appeal must be allowed. It follows that establishing that a tax advantage is contrary to the VAT Directives and the essential aim of the transactions is to obtain a tax advantage is an essential part of HMRC's case in an appeal where abuse of law is alleged. Accordingly, HMRC bear the burden of proving those matters.

77. In our view, these cases fall short of establishing the principle for which Mr Webster contends. In *E Buyer*, Sir Geoffrey Vos C and Hallett LJ are simply making the point that, if HMRC are asking the court or tribunal to make a finding of fraud or dishonesty against the taxpayer, HMRC must properly plead, particularize and prove their case. We note that *E Buyer* is an MTIC case and *Massey* an abuse of law case, so the burden was on HMRC in any event – in *E Buyer*, to show the relevant connection to fraud and, in *Massey*, to prove an abuse of law. They are not cases in which HMRC would not otherwise have the burden of proof in relation to the essential elements of the tax liability, but are treated as adopting the burden of proof simply because they assert in their pleadings that the taxpayer's conduct amounts to fraud or dishonesty.

78. If we turn to the case of *Khan*, on which the FTT relies as authority, we equally cannot read the passage to which the FTT refers (*Khan* [73] – [74]) as supporting its conclusion or for that matter Mr Webster KC's principle. We will address that passage in more detail below, but, in our view, the judgment of Carnwath LJ is consistent with our view that, unless one of the well-established exceptions applies, the burden remains on the taxpayer in tax appeals and is not reversed merely because allegations of fraud or dishonesty are involved (whether as a result of HMRC pleading fraud or dishonesty as part of its case or by suggesting that a taxpayer or a witness is guilty of fraud or dishonesty in meeting the taxpayer's case). Indeed, Carnwath LJ expresses that principle in almost precisely those terms earlier in his judgment (at *Khan* [69]) where he says:

> 69. There is no problem so far as concerns the appeal against the VAT assessment. The position on an appeal against a "best of judgment" assessment is well−established. The burden lies on the taxpayer to establish the correct amount of tax due …
>
> It should be noted that this burden of proof does not change merely because allegations of fraud may be involved (see e.g. *Brady (Inspector of Taxes) v Group Lotus Car Companies PLC* [1987] STC 635 at 642 … per Mustill LJ).

79. We are confirmed in our view by the judgments in the other cases in the line of authorities to which Mr Hayhurst refers. These cases clearly establish that the burden of proof is on the taxpayer to demonstrate that the assessment is wrong and to establish the correct amount of tax and is not reversed simply because HMRC assert fraud or dishonesty in traversing the taxpayer's case.

80. The first in this line of authorities is *Brady*. In that case, the General Commissioners discharged two assessments to corporation tax on the grounds that the Inland Revenue had failed to show that certain payments had been made to the taxpayer company. This was on the basis that, in the absence of evidence that the payments had been made to the company, the Inland Revenue were in effect alleging that there had been fraud, and that, in those circumstances, it was incumbent on them to prove fraud. The High Court (Sir Nicholas Browne-Wilkinson VC) allowed the Inland Revenue's appeal and remitted the case to the Commissioners on the grounds that the Commissioners had misdirected themselves in law as to the onus of proof.

81. The Court of Appeal dismissed the taxpayer's appeal. As Mustill LJ explained in his judgment, although, in correspondence with the taxpayer, the Inland Revenue had originally put their case on a basis that might have required HMRC to prove fraud, wilful default, or neglect, their case before the Commissioners related simply to the underlying liability and did not require them to plead fraud. Mustill LJ said this (at page 1058c-1058d):

> …We are told that, whatever the letter may have said, the Revenue was concerned only to protect its right to interest under section 88, and that, when it came to the hearing before the Commissioners, no attempt was made to advance a case under sections 36 and 39. Rather, the matter was approached, so far as the Revenue were concerned, on an ordinary *Haythornthwaite* basis. If this is so, and the contrary has not, as we understand it, been asserted, the formal burden of proof was not assumed by the Revenue. The Commissioners had no ground for approaching their fact-finding functions on any other basis than that it was for the taxpayers to make the running.

82. For this purpose, it was not relevant to the burden of proof that, in traversing the taxpayer's case, HMRC raised issues from which it might be inferred that the taxpayer was guilty of fraud. In that context, Mustill LJ said this (at page 1059e-f):

> It may well be that, if the taxpayer companies' version does not correspond with the true facts, it must follow that someone was guilty of fraud. This does not mean that by traversing the taxpayer companies' case the Revenue have taken on the burden of proving fraud. Naturally, if they produce no cogent evidence or argument to cast doubt on the taxpayer companies' case, the taxpayer companies will have a greater prospect of success. But this has nothing to do with the burden of proof, which remains on the taxpayer companies because it is they who, on the law as it has stood for many years, are charged with the task of falsifying the assessment. The contention that, by traversing the taxpayer companies' versions, the Revenue are implicitly setting out to prove a loss by fraud, overlooks the fact that, in order to make good their case, the Revenue need only produce a situation where the commissioners are left in doubt. In the world of fact there may be only two possibilities: innocence or fraud. In the world of proof there are three: proof of one or other possibility and a verdict of not proven. The latter will suffice, so far as the Revenue are concerned."

83. On this issue, Mustill LJ concluded (at page 1060):

> Before leaving this part of the case, I should mention the contention that there is a presumption of innocence which operates in any case where the defendant, by controverting the case put forward by the plaintiff, impliedly suggests that he has been guilty of dishonest conduct. I do not accept this argument. The fact that the possibility of fraud is on one side of the case will of course require the tribunal to take particular care when weighing the evidence, given the seriousness of any finding which puts in question the honesty of a party to a civil suit (see *Hornal v Neuberger Products Ltd* [1957] 1 QB 247). At the same time, I cannot accept that this bears on the burden of proof. The burden is material only to the question of which party succeeds if the tribunal is left in doubt. I can see no reason why the rule which entails that the taxpayer should fail in such a situation needs to be completely turned round simply because the alternative explanation of the facts to that advanced by the taxpayer is one which is explicable only on the ground of dishonesty on his part.
>
> I therefore conclude without hesitation that the commissioners were in error in stating that it was for the Revenue to prove fraud if the taxpayer companies' claim for an adjustment of the assessments was to be defeated.

84. The next case to which Mr Hayhurst referred was *Ingenious*. This is a decision of Henderson J, as he then was, sitting as a judge of the Upper Tribunal, in which he allowed, in part, an appeal against a decision of the FTT dismissing an application for an adjournment. As part of his decision, Henderson J addressed the question as to how the case should be managed

where HMRC's case was not pleaded as a case involving fraud, but allegations of dishonesty were to be put to the taxpayer's witnesses. He said this (at *Ingenious* [62] – [65]):

> 62. At the heart of the Appellants' amended case is the proposition that it is not open to HMRC to put allegations of dishonesty (or other serious forms of misconduct) to their witnesses, or to invite the FTT to make adverse findings of fact on such a basis, unless the relevant allegations have been pleaded with full particularity and the Appellants have been given a proper opportunity to respond to them.
>
> 63. In cases where the burden of proof lies on HMRC to establish fraud or dishonesty, these principles undoubtedly apply in the same way as they would in ordinary civil litigation. Examples include cases where HMRC wished to make assessments to income tax outside normal time limits on the ground (before 1989) of fraud or wilful default under section 36 of the Taxes Management Act 1970 , or (in the modern world) where, relying on principles developed by the Court of Justice of the European Union, they wish to deny a VAT-registered trader his otherwise incontrovertible right to deduct input tax because of his alleged participation in, or connection with, "missing trader" (or MTIC) fraud.
>
> 64. The present case, however, is not of that nature. It is common ground that the burden of proof lies on the Appellants to displace the closure notices issued to them by HMRC within normal time limits, and (in particular) to establish that the businesses of the relevant LLPs were carried on with a view to profit. This issue, as I have explained, is properly pleaded in HMRC's statement of case. No burden lies on HMRC to establish that the businesses were not carried on with a view to profit. It is for the Appellants to adduce such evidence as they think fit with a view to discharging the burden which throughout lies on them.
>
> 65. The IFP2 Information Memorandum is one of the pieces of documentary evidence relied upon by the Appellants as supporting their case on this issue. HMRC were under no obligation to accept it at face value, when it was disclosed to them, and they were fully entitled to cross-examine the witnesses for the Appellants who had been involved in its preparation in order to test its reliability and examine the assumptions on which it was based. HMRC were not obliged to give advance notice of the lines of questioning which they intended to pursue with the witnesses, and still less were they obliged to plead a positive case of dishonesty in preparation of the Memorandum before putting questions to the witnesses which, depending on how they were answered, might in due course provide a foundation for the FTT to draw such a conclusion. The obligations which lay on HMRC were in my judgment of a different nature. First, as a matter of professional duty, counsel may not put questions to a witness suggesting fraud or dishonesty unless they have clear instructions to do so, and have reasonably credible material to establish an arguable case of fraud. Secondly, as the FTT rightly recognised, it is not open to the tribunal to make a finding of dishonesty in relation to a witness unless (at least) the allegation has been put to him fairly and squarely in cross-examination, together with the evidence supporting the allegation, and the witness has been given a fair opportunity to respond to it. Important though these obligations are, they are quite different from, and do not entail, a prior requirement to plead the fraud or misconduct which is put to the witness. If it were otherwise, a party would be obliged to serve an amended statement of case before attempting to expose a witness as dishonest in cross-examination, and the element of surprise which can be a potent weapon in helping to expose the truth would no longer be available.

85. In this passage, Henderson J is dealing primarily with a case management issue. However, the passage highlights the key distinctions as we see them. In a case where fraud, dishonesty or some other serious conduct is an essential element of the tax liability in question, HMRC will have the burden of proof in respect of that issue. HMRC must plead that conduct with appropriate particularity (*Ingenious* [63]). In other cases, the burden remains on the taxpayer to displace the closure notice (*Ingenious* [64]), although as a matter of procedural fairness, if HMRC wish to put questions to a witness suggesting fraud or dishonesty on the part of that witness, they are required to ensure that the allegation has been put to the witness fairly and squarely in cross-examination, together with the evidence supporting the allegation, and the witness has been given a fair opportunity to respond to it (*Ingenious* [65]).

86. The final case in this line of authorities to which we were referred by Mr Hayhurst was *Awards*. This case involved an appeal against two best judgment assessments made under section 73 VATA.

> 38. A related question is whether there is any obligation on HMRC to plead an allegation of fraud, with the necessary particularity, in a case where the burden of displacing the assessment remains throughout on the taxpayer, but HMRC wish to rely on the possibility, or even the certainty, that some form of fraud must have been committed when testing the evidence adduced by the taxpayer. In my view, it is clearly implicit in *Brady* that this question must be answered in the negative.

87. Henderson LJ then quoted the passage from his judgment in *Ingenious* (at *Ingenious* [62] – [65] to which we have just referred and continued (at *Awards* [40]) by referring with approval to the conclusions of the Upper Tribunal in *Awards*:

> 40. In the present case, the Upper Tribunal clearly had these principles well in mind. In a section of the UT Decision, headed "Proof, pleadings and dishonesty", they referred extensively to *Brady* and *Ingenious Games* at [30] to [35], before concluding:
>
> "36. Two principles emerge from *Ingenious* and *Brady*:
>
> (1) The burden of showing an assessment is incorrect remains on the taxpayer throughout the appeal. This is so even if the circumstances of the case are such that there either must, or may, have been some fraudulent conduct on the part of the taxpayer which is relevant to the tax liability.
>
> (2) The allegation that a witness is dishonest must be put fairly and squarely to the witness in cross-examination before the tribunal can find the witness is dishonest, but does not need to have been pleaded in advance in cases where the burden is on the taxpayer.
>
> 37. The fact that no authority was cited in *Ingenious* for that latter proposition reflects that it is a long-held and established principle: *Browne v Dunn* (1893) 6 R 67 explains that the principle is grounded in fairness. That principle was approved by the Court of Appeal in *Markem Corporation v Zipher Ltd* [2005] EWCA Civ 267."

88. In his judgment in *Awards*, Henderson LJ therefore essentially reiterates some of the key principles from his judgment in *Ingenious* that we have summarized above.

89. We regard all these cases (*Brady*, *Ingenious*, *Awards* together with *Khan*) as supportive of our view. We accept that none of them directly addresses the question of whether HMRC assumes the burden of proof in relation to the essential elements of the tax liability in a case where fraud or dishonesty is not an essential element, but HMRC pleads fraud or dishonesty.

However, in our view, the burden does not change in such cases; the burden remains on the taxpayer to show that the closure notice is wrong and to establish the correct amount of tax. If for any reason, HMRC plead fraud or dishonesty in such cases – for example, because HMRC are seeking such a finding from the court or tribunal because of the part that it might play in future penalty proceedings – HMRC should plead their case with appropriate particularity, and prove it. However, that does not reverse the burden of proof in relation to the essential elements of the underlying assessment.

90. For these reasons, we do not agree with the FTT's broad conclusion or with Mr Webster KC's general principle.

The burden of proof in penalty appeals

91. On an appeal against a penalty assessment, it is well-established that the general rule is that the burden is on HMRC to prove all aspects giving rise to the penalty (see, for example, *R (PML Accounting Ltd) v HMRC* [2018] EWCA Civ 2231 ("*PML*") [101]).

92. The underlying rationale for this presumption is commonly stated to be that appeals against penalty assessments are "criminal" proceedings for the purposes of Article 6 ECHR (*King v Walden* [2001] STC 822 at [71], *Customs & Excise Commissioners v Han* [2001] EWCA Civ 1040). If so, Article 6(2) ECHR requires that a defendant be presumed innocent until proven guilty. It follows that the burden falls on HMRC to prove that the conditions for a penalty to be issued are met.

93. In his submissions to this tribunal, Mr Webster KC acknowledged that the right of a defendant under Article 6(2) ECHR is a "qualified right". Article 6(2) does not prohibit the creation of presumptions of fact or law (*Salabiaku v France* (1988) 13 EHRR 379, *Sheldrake v DPP* [2004] UKHL 43 ("*Sheldrake*")). However, exceptions to the presumption of innocence have to be confined within reasonable limits and should not be arbitrary. In appropriate cases, therefore, it may be possible to justify an exception to the general principle to the extent that it is a justifiable and proportionate response to a legitimate issue. The justifiability of any exception requires "an examination of all the facts and circumstances of the particular provision and the particular case" (*Sheldrake* [21] per Lord Bingham).

94. In this respect, Mr Webster KC referred to the decision of the Court of Appeal in *Euro Wines*. That case concerned the imposition of a penalty on a person holding excise goods under paragraph 4 Schedule 41 FA 2008. The taxpayer appealed against the decision of the Upper Tribunal that the provisions of section 154 CEMA 1979 – which imposed the burden of proof on the taxpayer to show that duty had been paid on excise goods – was incompatible with Article 6(2) ECHR. The Court of Appeal dismissed the appeal finding that, in the circumstances, it was reasonable and proportionate to impose the reverse burden of proof on traders in excise goods. In reaching this conclusion, David Richards LJ, giving the judgment of the court, took into account the following factors (i) that the penalty was of a regulatory nature and its imposition was not dependent on the proof of fault on the part of the trader (*Euro Wines* [34]); (ii) that the penalty was being imposed on a trader in excise goods, who would be aware of the risks of holding goods in respect of which duty had not been paid (*Euro Wines* [35]); and (iii) that it remained open to the trader to disprove the presumption or to show that the trader had a reasonable excuse for the default (*Euro Wines* [38]). In those circumstances, David Richards LJ considered that the reverse burden of proof was justified "in circumstances where the evasion of duty was a longstanding problem with serious consequences for the public

finances" (*Euro Wines* [42]). Mr Webster KC says that there is no such justification in the present case for a departure from the general rule.

95. As we have mentioned, Mr Hayhurst, for HMRC, argued before the Tribunal that even on an appeal against the penalty assessment, the general rule was that the burden of proof fell on the taxpayer except where statute expressly or impliedly provided otherwise or one of the well-established exceptions (such as in cases involving the application of the *Kittel* principle) applied. He made this argument by reference to the series of cases to which we have just referred (namely *Brady*, *Khan*, *Ingenious*, and *Awards*).

96. We do not accept this submission. As an initial point, we do not accept that this line of cases is authority for the position that Mr Hayhurst advances. This is particularly the case in relation to the decisions in *Brady*, *Ingenious* and *Awards*. These cases are not penalty cases. As we have discussed, they establish that, in a tax appeal the burden is on the taxpayer even in cases which involve allegations of fraud or dishonesty subject to the well-established exceptions to which we have referred. They do not justify a departure from the general rule – based on Article 6(2) ECHR – that, in penalty proceedings, the onus is on HMRC to prove all aspects of the case required to impose the penalty subject to any exceptions expressly or impliedly required by that statute.

97. The only penalty case in the line of cases to which Mr Hayhurst refers is *Khan*. That case involved appeals by the taxpayer, Mr Khan, against a decision of the Commissioners for HM Customs & Excise that his taxable supplies had been above the VAT threshold, with the consequence that he should have been registered for VAT, against a "best judgment" assessment to VAT under section 73 VATA, and against a civil penalty under section 60 VATA.

98. The appeals raised various issues: unfairness at interview; breach of Article 6 ECHR at the hearing of the appeals before the tribunal; the burden and standard of proof; and irrationality. So far as the burden of proof was concerned, the Commissioners had not disputed that the burden was on them to prove that Mr Khan had acted or omitted to act for the purposes of evading VAT, and that his conduct involved dishonesty. Mr Khan's argument was that the burden was also on the Commissioners to show that the VAT threshold had been exceeded and, for the purposes of the penalty calculation, that the "best judgment" assessment (by reference to which the penalty was calculated) was correct. The Commissioners conceded that the burden of proof lay on them not only to show that Mr Khan's supplies had exceeded the VAT registration threshold, but also to establish the quantum of tax evaded. Their contention was that they had discharged these burdens.

99. In the Court of Appeal, Carnwath LJ was not content with the analysis of the parties in relation to the burden of proof. As he explained, at *Khan* [68]:

> 68. In spite of the common ground, which thus emerges from the judgment below and the submissions of the parties, I find some difficulty with this analysis. In view of the potential importance of this issue for other cases, I am reluctant to allow this judgment to rest simply on concessions, although I acknowledge that understandably the issues may not have been fully explored in argument. I will summarise my own understanding of the principles derived from the relevant statutory provisions and case−law.

100. Carnwath LJ then supplied his own analysis, beginning with the appeal against the underlying assessment to VAT (at *Khan* [69] to which we refer at [78] above). He then went on to consider the question of burden of proof more generally, at *Khan* [70]:

> 70. The other rights of appeal under section 83 have not been given such detailed examination by the courts. However, the general principle, in my view, is that, where a statute gives a right of appeal against enforcement action taken by a public authority, the burden of establishing the grounds of appeal lies on the person appealing.

101. After citing two planning cases in support of this proposition, Carnwath LJ set out his analysis of where the burden of proof lay in relation Mr Khan's appeals, including the appeal against the civil evasion penalty. The relevant part of the judgment is found at *Khan* [73]-[74]:

> 73. The ordinary presumption, therefore, is that it is for the appellant to prove his case. That approach seems to me to be the correct starting−point in relation to the other categories of appeals with which we are concerned under section 83, including the appeal against a civil penalty. The burden rests with the appellant except where the statute has expressly or impliedly provided otherwise. Thus, the burden of proof clearly rests on Customs to prove intention to evade VAT and dishonesty. In addition, in most cases proof of intention to evade is likely to depend partly on proof of the fact of evasion, and for that purpose Customs will need to satisfy at least the tribunal that the threshold has been exceeded. But, as to the precise calculation of the amount of tax due, in my view, the burden rests on the appellant for all purposes.
>
> 74. This view is reinforced by a number of considerations:
>
> i) It is the appellant who knows, or ought to know, the true facts.
>
> ii) Section 60(7) makes express provision placing the burden on Customs in relation to specified matters. This suggests that the draftsman saw it as an exception to the ordinary rule, and seems inconsistent with an implied burden on Customs in respect of other matters.
>
> iii) The distinction is also readily defensible as a matter of principle. Mr Young relied on "the presumption of innocence" under Article 6 of the Convention, but he was unable to refer us to any directly relevant authority. The presumption clearly justifies placing the burden of proof on Customs in respect of tax evasion and dishonesty; but once that burden has been satisfied, a different approach may properly be applied (compare *R v Rezvi* [2003] 1 AC 1099; [2002] UKHL1, in relation to confiscation orders in criminal proceedings).
>
> iv) In relation to the calculation of tax due the subject−matter of the assessment and penalty appeals is identical. This link is given specific recognition by section 76(5) (allowing combination in one assessment). It would be surprising if the Act required different rules to be applied in each case.
>
> v) Section 73(9) provides that the assessed amount, subject to any appeal, is "deemed to be an amount of VAT due×" In a case where either there was no appeal against the assessment, or the penalty proceedings followed the conclusion of any such appeal, this provision would appear to preclude any attempt to reopen the assessment for the purpose of assessing the penalty. The subsection does not apply directly where, as here, the penalty appeal is combined with an appeal against the assessment, and the assessment has not therefore become final, but it indicates another link between the two procedures. (I do not see the provision as necessarily confined to enforcement, as Mr Young argues. Nor in the present context do I need to spend time on his argument that this interpretation could cause unfairness in proceedings against a third party under section 61 , although

> I note that under that provision there appears to be a general power to mitigate the penalty.)
>
> vi) To reverse the burden of proof would make the penalty regime unworkable in many cases. In a case such as the present, a "best of judgment" assessment is needed precisely because the potential taxpayer has failed to keep proper records, so that positive proof in the sense required in the ordinary civil courts is not possible. The assessment may be no more than an exercise in informed guesswork. Indeed to put the burden on Customs would tend to favour those who have kept no records at all, as against those who have kept records, which are merely inadequate, but may be enough to give rise to an inference on the balance of probabilities .

102. There is an argument that this guidance from Carnwath LJ in *Khan* is strictly obiter given that the Court of Appeal was able to reach its decision on the basis of the agreed position of the parties (to which Carnwath LJ refers at *Khan* [69]). However, the judgment is referred to with approval by Henderson LJ in *Awards* (*Awards* [37]). Although it is not strictly binding upon us, we take due regard of the analysis set out in this judgment as being at least helpful guidance and guidance which we should follow (particularly in relation to the burden of proof in the context of civil evasion penalties under section 60 VATA).

103. We note, in particular, the following points from Carnwath LJ's judgment.

(1) As a general point, Carnwath LJ's analysis suggests that the burden is on the taxpayer in both tax appeals and penalty appeals except where the statute expressly or impliedly dictates otherwise (*Khan* [73]). In this respect, the comments of Carnwath LJ lend some support to the principle for which Mr Hayhurst, on behalf of HMRC, argued before this tribunal.

(2) These comments have to be read in their context, namely that of an appeal against a civil evasion penalty under section 60 VATA. In such a case, the statute is clear that the burden falls on HMRC in relation to the intention to evade VAT and dishonesty (see section 60(7) VATA). The clear implication was that the burden of proof on other matters fell on the taxpayer. This point is acknowledged by Carnwath LJ in his judgment (*Khan* [73], [74(ii)]). Those other matters included the quantum of the underlying liability where the burden of proof fell on the taxpayer "for all purposes" i.e. including for the purposes of the civil evasion penalty (*Khan* [73]);

(3) Even so, as Carnwath LJ acknowledges (*Khan* [73]), in proving an intention to evade VAT for the purposes of section 60 VATA, HMRC must necessarily also prove "the fact of evasion". For that reason, the burden was on HMRC to establish that the VAT threshold had been exceeded and, by implication, also that the taxpayer had made sufficient taxable supplies in order to exceed the relevant threshold.

(4) In relation to the question of the burden of proof in relation to the amount of the underlying tax liability on which the penalty was based, the burden remained on the taxpayer. In this context:

> (a) Carnwath LJ considered that any concerns about the application of Article 6 ECHR in this context were adequately addressed by the fact that section 60(7) VATA placed the burden on HMRC in relation to the issues of dishonesty and evasion (*Khan* [74(iii)]);

(b) Carnwath LJ directly addressed the question of the burden of proof in penalty cases where there had been no appeal against the underlying assessment – which was not the case in *Khan* itself (see *Khan* [74(v)]). In his view the amount of the liability assessment in such cases became an amount of VAT due (by virtue of section 73(9) VATA) and in the separate penalty proceedings there was no scope to reopen the underlying assessment;

(c) finally, Carnwath LJ notes that there are policy reasons for the burden of proof being imposed on the taxpayer in relation to questions of the underlying liability. The alternative – that the burden was on HMRC – would favour non-compliant and uncooperative taxpayers (*Khan* [74(vi)]).

104. As we have mentioned above, this passage provides some support for the proposition that Mr Hayhurst advances. However, the judgment has to be set in its context. Furthermore, as the Carnwath LJ's analysis acknowledges, any decision on where the burden of proof lies has to pay due regard to and be compatible with the presumption of innocence in Article 6(2) ECHR. The reason that Carnwath LJ was able to come to the view that the onus was on the taxpayer in relation to the quantum of the tax liability was that the statute provided clear guidance as to where the burden should fall, and he was satisfied that the requirements of Article 6(2) were met at least in part by the allocation of the burden in relation to issues of evasion and dishonesty to HMRC.

105. In the usual case, an appeal against the imposition of the penalty will take place against the background of an appeal against the tax liability to which it relates. The assessment of that liability will either have been finalised or will be determined as part of the same proceedings. The statements made regarding the burden of proof in many cases concerning penalty assessments will therefore often assume that questions relating to the substantive liability have been settled. Such statements can properly be regarded as limited to the conditions that have to be fulfilled for the imposition of the penalty (for example, the conduct of the taxpayer and whether that conduct has brought about a loss of tax).

106. That having been said, the case law is clear that it is open to a taxpayer when disputing a penalty assessment to challenge the underlying tax liability itself (see, for example, *Bell v HMRC* [2018] UKFTT 0225 (TC) [159]-[160]). If a taxpayer seeks to do so, issues of issue estoppel (rare in tax cases) and/or abuse of law may arise (see *HMRC v Kishore* [2021] EWCA Civ 1565)). However, HMRC have not sought to argue that estoppel or abuse of law issues arise in these appeals.

107. In a case where a taxpayer does challenge a penalty assessment on the grounds that the underlying tax assessment is wrong and an estoppel or abuse of law issue does not arise, there is a potential conflict between the two general rules to which we have referred governing the burden of proof in tax appeals and the burden of proof in penalty appeals. This is particularly acute where the underlying assessment has not been the subject of litigation.

108. Of the cases to which we have been referred, there is only one case outside the First-tier Tribunal that directly addresses this issue. That is the Upper Tribunal decision in *Zaman v HMRC* [2022] UKUT 252 (TCC) ("*Zaman*"). In that case, the taxpayer, Mr Zaman, appealed against a PLN which had been issued to him following a VAT assessment on a company, Zamco Limited, of which he was the sole director. Zamco did not appeal the assessment.

109. The FTT allowed Mr Zaman's appeal on the grounds that HMRC had not shown, on the balance of probabilities, that the relevant goods (alcoholic drinks) had been supplied in the UK.

On appeal to the Upper Tribunal, HMRC argued that the FTT erred by failing to apply a shift in the "evidential onus of proof" in circumstances where Mr Zaman asserted before the FTT that there were no "vatable supplies". At that point, HMRC argued, Mr Zaman assumed the evidential burden of displacing the assessment, and, if he failed to discharge that burden, the penalty should stand (*Zaman* [22]). The Upper Tribunal allowed HMRC's appeal. The Upper Tribunal said this at *Zaman* [34]:

> 34. However, in our judgment, HMRC are plainly right that, as per their submissions that we have set out above, if the challenge to the PLN was brought on the basis that the assessment to VAT on Zamco was wrong, the legal rules relating to the way in which the assessment could have been challenged by Zamco if it had appealed the assessment remain in play in any appeal against the PLN. As we set out above, it is well-established law that it is for the taxpayer to prove, by evidence, that an assessment to VAT issued by HMRC is incorrect. HMRC do not have that evidential burden and that cannot sensibly be affected by the fact that the challenge to the assessment occurs in satellite litigation where, as in this case, a penalty charged on Mr Zaman is sought to be defended on the basis that the assessment to VAT on Zamco was wrong. In our judgment, it is clear that the FTT lost sight of the fact that after establishing whether the PLN was validly issued, the evidential burden in relation to the assessment to VAT on Zamco shifted to Mr Zaman when he sought to positively challenge the assessment as the sole basis on which the PLN was invalidly issued: see the FTT's overall conclusion at [96] as to whether HMRC had discharged the burden of proof: (emphasis added)
>
> > "*We thus find that it has not been proven*, on the balance of probabilities, that the alcoholic goods in question were removed to the UK by Zamco or under its directions; and so, for the same reason, it is not proved that the place of supply of all of Zamco's supplies in the relevant period was the UK, such that its VAT returns in that period contained inaccuracies. *Given the burden of proof on HMRC, this means that we have to allow the appeal* ..."

110. The Upper Tribunal's decision in *Zaman* therefore suggests that if a challenge to a penalty assessment is made solely on the basis that the underlying assessment to tax is wrong, the burden remains on the taxpayer to show that the assessment was wrong. The burden does not fall on HMRC simply because the matter is being determined as part of an appeal against the penalty. The burden only falls on HMRC in respect of the additional requirements that are required to be fulfilled in order to impose a penalty.

111. The Upper Tribunal is very clear in its decision in *Zaman*. However, we do have some reservations about it. In particular, there is no reference in the decision to the potential application of Article 6(2) ECHR. Nor is there reference to the leading cases on the burden of proof in the case of penalty assessments (such as *King v Walden*, *Khan* and *Euro Wines*). This is so notwithstanding that the practical effect of the decision of the Upper Tribunal in *Zaman* appears inconsistent with the guidance of Carnwath LJ in *Khan* (albeit in a different statutory context) in that Carnwath LJ accepted that some essential elements of the underlying tax liability (i.e. whether the threshold was exceeded) were part of the issue of evasion and for HMRC to prove.

112. Having reviewed the authorities, in our view, the key cases (principally *King v Walden* and *Euro Wines*) are clear that the question of the scope of the burden of proof in penalty appeals must be determined by reference to the application of the presumption of innocence in Article 6(2) ECHR. On that basis, the burden must fall on HMRC in penalty appeals unless an

exception to the presumption can be justified. Whether or not an exception can be justified will depend upon all the facts and circumstances of the case. A penalty appeal in which a penalty is challenged on the basis that the underlying assessment is wrong – once questions of estoppel or abuse of process have been addressed – remains a penalty appeal. As such, and as a general rule, the principle that the burden is upon HMRC in penalty appeals includes a penalty appeal of this kind; that is to say a penalty appeal where the challenge is made on the basis that the underlying assessment is wrong.

113. As we have mentioned above, it is arguable that Carnwath LJ's comments regarding the burden of proof in his judgment in *Khan* are strictly obiter. However, they are approved by Henderson LJ in *Awards* (*Awards* [37]). In any event, we do not regard our conclusion as inconsistent with Carnwath LJ's judgment in *Khan*. In our view, his judgment falls within the exception. The relevant statute in *Khan* – section 60(7) VATA – defined the matters that were for HMRC to prove on any appeal. The clear implication was that the burden fell upon the taxpayer in relation to other matters. Carnwath LJ considered the implications of Article 6(2) ECHR and decided that they were adequately addressed.

114. As regards the decision of the Upper Tribunal in *Zaman*, which falls within the same statutory context as the appeals against the PLNs in this case, for the reasons that we have given, in our view the decision may be regarded as *per incuriam* given that there is no reference in the decision to the leading cases on penalty appeals or to Article 6(2) ECHR. In any event, we respectfully disagree with the conclusion in that case. We acknowledge that, although a decision of the Upper Tribunal is not binding on a later Upper Tribunal, as a tribunal of coordinate jurisdiction we should normally follow the decision of the earlier tribunal unless we are satisfied that the earlier decision is wrong (see *Gilchrist v HMRC* [2014] UKUT 169 (TCC) at [94]). However, on this issue, we are satisfied that the decision in *Zaman* is wrong, and so we will not follow it.

Application to the facts of this case

115. We turn now to the application of those principles to the facts of this case.

DLN

116. We will deal first with the DLN issued to Mr Malde.

117. The DLN was issued by HMRC under section 61 VATA in relation to the civil evasion penalty imposed on SA as a result of SA's dishonest failure to register for VAT. Under the DLN, HMRC seek to recover the whole of the penalty from Mr Malde "as if he were personally liable under section 60 VATA to a penalty" of that amount (section 61(3) VATA).

118. It is therefore Mr Malde who appeals against the imposition of the civil evasion penalty itself (the "basic penalty" as referred to in section 61(2) VATA). In relation to Mr Malde's appeal against the basic penalty, the same rules apply to Mr Malde's appeal as would have applied to an appeal by SA. Accordingly, as in *Khan*, section 60(7) VATA applies to impose the burden of proof on HMRC in relation to the questions of whether SA has for the purposes of evading VAT taken any action or omitted to take any action and whether that conduct involves dishonesty. In proving the intention to evade, HMRC must also prove the fact of evasion (*Khan* [73]). In *Khan*, Carnwath LJ took the view that "in most cases, proof of intention to evade is likely to depend partly on proof of the fact of evasion" (*Khan* [73]). The effect was that, in a case involving a penalty for failure to register for VAT, the burden was on

HMRC to show that the VAT threshold had been exceeded. We take a similar approach in this case.

119. In the present case, the issue of whether the threshold has been exceeded necessarily involves not only the question of whether the level of supplies that were made by SA exceeded the threshold, but also the question of whether those supplies were made in the UK. Following the guidance set out by Carnwath LJ in *Khan*, both of these issues fall to HMRC to prove in order to establish liability to the basic penalty. That conclusion is also consistent with the authorities suggesting that the general rule in penalty appeals is that the burden is on HMRC to prove all aspects relating to the imposition of the penalty (*King v Walden*, *PML*).

120. The exception, to which Carnwath LJ referred in *Khan*, relates to the burden of proof in relation to the quantum of the underlying tax liability by reference to which the penalty is calculated. In *Khan*, Carnwath LJ expressed the view that the burden remains on the taxpayer in relation to the quantum of the underlying tax liability. This was on the basis that the implication of the drafting of section 60(7) VATA was that issues other than those identified in the section as falling to HMRC to prove must fall to the taxpayer (*Khan* [74(ii)]). Any concerns about the implications of Article 6(2) ECHR were, in Carnwath LJ's view, adequately addressed by the imposition of the burden on HMRC in relation to the issues identified in section 60(7) (*Khan* [74(iii)]). In accordance with that guidance, Mr Webster KC conceded in his submissions to this tribunal that the burden fell on the taxpayer in relation to issues as to the quantum of the underlying liability. That view was also consistent with the FTT's treatment of the issues in this case. We would follow the same approach.

121. In addition, to the appeal against "the basic penalty", although Mr Malde is not entitled to appeal against the issue of the DLN itself, he is, in accordance with section 61(5)(b) VATA entitled to appeal against both HMRC's decision that the conduct of SA giving rise to the penalty (i.e. the failure to register) was attributable to his dishonesty, and against HMRC's decision to recover 100% of the civil evasion penalty from him rather than the company. In relation to the burden of proof on these issues, we can derive no guidance from *Khan* as it did not involve a DLN. However, in our view, the burden must fall on HMRC. This is a penalty appeal and so Article 6(2) ECHR would ordinarily dictate that the burden of proof should fall on HMRC (as outlined in *King v Walden* and *PML*) in the absence of factors which justify a departure from the presumption of innocence in Article 6(2) ECHR. There are no such factors in this case. Furthermore, the former issue involves an assertion by HMRC of dishonesty on the part of Mr Malde, which in accordance with general principle, HMRC must plead and prove.

122. It follows that we find no error in the FTT's approach in relation to the DLN. All the issues before the FTT were for HMRC to prove apart from the quantum of the underlying liability on which the penalty was based.

Penalties under Schedule 24 FA 2007 and Schedule 41 FA 2008

123. We turn now to the penalties that were issued under the regime in FA 2007 and FA 2008.

124. Apart from the quantum of the underlying liability on which the penalty was based, the key issues involved in relation to each of the penalties were as follows.

> (1) In relation to the registration penalty charged on Global under paragraph 1 Schedule 41 FA 2008, the key matters to be proved are that:

(a) Global was required to register for VAT (i.e. its taxable supplies exceeded the VAT threshold) but failed to register; and

(b) the failure was due to relevant conduct on the part of Global.

(2) In relation to the PLN issued to Mr Malde in respect of the registration penalty under paragraph 22 Schedule 41 FA 2008, the key matters to be proved are that:

(a) a penalty is payable by Global under paragraph 1 for the failure to register;

(b) the failure was deliberate; and

(c) the failure was attributable to Mr Malde.

(3) In relation to the PLN issued to Mr Malde in respect of the inaccuracy penalty under paragraph 19 Schedule 24 FA 2007, the key matters to be proved are that:

(a) a penalty is payable by Global under paragraph 1 Schedule 24 FA 2007, which requires it to be shown that Global submitted a return containing an inaccuracy, the inaccuracy led to a loss of tax, and that the inaccuracy was careless or deliberate on the part of Global;

(b) the failure was deliberate, and

(c) the failure was attributable to Mr Malde.

(4) In relation to the PLN issued to Mr Malde in respect of the excise duty penalty under paragraph 22 Schedule 41 FA 2008, the key matters to be proved are:

(a) that a penalty is payable by Global under paragraph 4 Schedule 41 FA 2008 which requires it to be shown that Global was holding excise goods for which payment of duty was outstanding;

(b) that the failure was deliberate; and

(c) that the failure was attributable to Mr Malde.

125. At this point, we should note that we have treated Global's appeal against the decision of HMRC that it was required to register for VAT as subsumed within the appeal against the registration penalty. Although at first sight, it would appear that this is a separate appeal (and not a penalty appeal), in this case, the only practical manifestation of the decision that Global was required to be registered for VAT purposes is the registration penalty. The issues that are relevant – in particular, whether Global made taxable supplies in the UK in excess of the VAT threshold – are the same as those which form the basis of the registration penalty. In our view, any decision on the imposition of the burden of proof in relation to the decision that Global was required to be registered must therefore follow the decision on the burden of proof in relation to the registration penalty.

126. Leaving aside the issue of the quantum of the penalty, Mr Webster KC says that there was no intention on the part of Parliament to change the burden of proof at the time of the introduction of the revised penalty regime FA 2007 and FA 2008. The position was intended to be the same as that under the civil evasion penalty regime. Mr Webster KC referred us to

various extra-statutory materials including Explanatory Notes for the legislation introducing the revised penalty regime and various extracts from HMRC's manuals.

127. We prefer not to base our decision on the extra-statutory materials. In our view, we can determine this issue by reference to the principles drawn from the case law to which we have previously referred. These are penalty appeals. On all of the issues relating to the penalty, the burden should fall on HMRC as they are all issues to which Article 6(2) ECHR potentially applies unless there is some good reason to justify a departure from that principle. We have considered whether the presumption of innocence in Article 6(2) ECHR should apply in these cases. This is not a case (such as *Euro Wines*) of a statutory exception to the general rule which can be tested by reference to whether the exception is a justifiable and proportionate response to a legitimate legislative aim. In the absence of an express statutory provision to the contrary, in our view, the general rule – that on penalty appeals the burden falls on HMRC – should apply. We can see no good reason to depart from the general principle in this case. These are significant penalties. They are dependent on proof of "deliberate" conduct on the part of Global and/or Mr Malde, which even if it does not equate directly to the concept of dishonesty carries similar connotations of moral turpitude.

128. The question for us is whether that general rule should also apply to those aspects of the appeals where the appellants' case challenges the penalties on the grounds that call into question essential elements of the relevant tax assessment – principally, in relation to the VAT penalties, whether or not Global made taxable supplies in excess of the threshold, and, in relation to the excise duty penalties, whether Global held excise goods in the UK on which excise duty had not been paid.

129. As we have described, those points were decided by the FTT's conclusion that there was an "absence of evidence" that Global was the owner of the goods that were supplied in the UK. That conclusion which was clearly based on its decision on the burden of proof, in effect, decided all the penalty appeals in the appellants' favour with the exception of the appeal against the DLN.

130. This is therefore a similar question to that which arose in *Zaman*, where the Upper Tribunal decided that, in circumstances where no appeal against the underlying liability had been contested, the burden in relation to those elements should remain on the taxpayer.

131. We will not follow that approach in this case. These are penalty appeals. The general rule is that the burden is on HMRC to prove all aspects of these appeals that relate to the imposition of the penalties consistent with the presumption of innocence in Article 6(2) ECHR. We should only depart from that rule where a justifiable and proportionate exception to the presumption can be justified on the facts and circumstances of the case. We cannot justify an exception on the facts and circumstances of this case for the following reasons:

> (1) The penalties in this case are not of a regulatory nature. They are substantial penalties that are only payable if it is shown that there has been "deliberate" conduct on the part of Global and/or Mr Malde that has caused a loss of tax.
>
> (2) The relevant issue in each case is whether Global was the owner of the goods in the UK. That issue is integral to the "failure" on which each of the penalties is based – the failure to register, the failure to provide an accurate return, and the failure to ensure that duty was paid on excise goods that are held in the UK.

(3) That issue has not been the basis of a prior decision of a court or tribunal (as Global was unable to appeal following the failure of its hardship appeal) nor is it the subject of an agreed settlement.

(4) HMRC has not raised any question of issue estoppel or abuse of law.

132. For the sake of completeness, we note that the FTT decided each of the appeals in relation to the PLNs that were issued under the regime in FA 2007 and FA 2008 by reference to the place of supply issue. As a result, the question of the burden of proof in relation to the quantum of a penalty assessment under each of these provisions does not arise in relation to the appeals before us. We do not need to determine that question to decide these appeals and we do not do so.

133. For all of these reasons, in our view, the FTT was right to conclude that the burden of proof fell on HMRC in relation to all relevant aspects of the penalty appeals with the possible exception of the quantum of the penalty assessment. Although it is not directly relevant, we take comfort that our view is in line with the guidance of Carnwath LJ in *Khan* in relation to the previous penalty regime.

Conclusion

134. We dismiss this first ground of appeal.

GROUND 2: APPROACH TO THE ISSUES AND EVIDENCE

135. Ground 2 is that the FTT erred in law in its approach to the issues and the evidence by compartmentalizing factors rather than examining the totality of the evidence.

Background

136. The focus of this ground is again on the manner in which the FTT determined the place of supply issue. In summary, Mr Hayhurst says that the FTT took a wrong step at FTT [605] when it decided to determine the place of supply issue before deciding whether Mr Malde was the controlling mind behind both SA and Global. The effect was that the FTT decided the place of supply issue without taking into account the evidence as to whether Mr Malde controlled Global. In doing so, the FTT failed to consider the evidence as a whole before reaching its conclusion, contrary to the guidance of the Court of Appeal in *CCA Distribution Limited v HMRC* [2017] EWCA Civ 1899 ("*CCA*") at [31] and *Davis & Dan Ltd v HMRC* [2016] EWCA Civ 142 ("*Davis & Dan*") at [57]-[60].

The FTT Decision

137. The point was squarely before the FTT when it came to consider the order in which it should determine issues, at FTT [598]-[605].

138. The arguments of the parties, which were repeated before us, are set out in the FTT Decision. At FTT [600]-[602], the FTT recorded the argument of Mr McGuiness KC, who appeared for HMRC before the FTT, in the following terms:

> 600. Additionally, Mr McGuinness contends that if Mr Malde, who has put himself forward relying on the power of attorney (see above) as the person entitled to represent and pursue these appeals in relation to Global (which is the undisputed successor and carrying on the same business as SA), was in

> control of SA and Global he would be in a position to produce trading records for both companies but has chosen not to do so.
>
> 601. This, Mr McGuinness says, is a very relevant consideration to the determination of the Place of Supply issue and the quantum of the best of judgment assessment that was made by Mr Foster on the material he had, particularly in relation to the arguments advanced on behalf of the appellants regarding lack, or paucity, of evidence. He says that should we determine that Mr Malde did control SA and Global it should "significantly influence" our decision as he has chosen not to place before the Tribunal evidence to which, by virtue of his position of control, he had access.
>
> 602. To do otherwise would, he submits, be tantamount to a fraudster's charter because, if we decide against Mr Malde on the issue of control, the logical consequence would be that he has deliberately chosen not to put the SA and Global material before the Tribunal which, Mr McGuinness argues, is more likely to support HMRC's case and rather than Mr Malde's or Global's.

139. The argument in favour of considering the place of supply issue before the control issue, as advanced by Mr Webster KC, was recorded by the FTT in the following terms, at FTT [603]-[604]:

> 603. Mr Webster, however, contends that there are two significant issues with such an approach. The first is that it effectively reverses the burden of proof; and the second is the circularity of the argument raised by HMRC in that if we were to find he controlled SA and Global it would be Mr Malde's choice not to produce the records of the respective companies with the inference to be drawn that his failure to do so would show that the companies did make supplies in the United Kingdom. Mr Webster says that this undermines Mr Malde's primary defence – that he did not control the companies and cannot produce any trading records – and that it would be neither fair nor appropriate to proceed on such a basis.
>
> 604. Additionally, Mr Webster submits, that where a company is controlled and where it trades from are separate issues and there is no logical connection. As such even if we were to find that Mr Malde did control SA and Global it would not assist us in determining whether their supplies were made in the United Kingdom.

140. The conclusion of the FTT on the order of issues, at FTT [605], was in the following terms:

> 605. Having given the matter some thought, we accept Mr Webster's submission regarding the reversal of the burden of proof. Having come to such a conclusion and given Mr Webster's secondary point, concerning the circularity of HMRC's argument, was a matter raised by the Tribunal (Ms Hunter) during the oral closing submissions, we have decided to consider the Place of Supply Issue before that of control of SA and Global. An advantage of such an approach is that a finding that neither SA nor Global made any supplies in the United Kingdom would be determinative whereas as finding that Mr Malde did not control either company would limit, but not completely eliminate, consideration of the Place of Supply and Quantum issues."

Discussion

141. From a case management point there was, in theory, merit in deciding the place of supply issue before the control issue for the reason identified by the FTT. If the place of supply issue was decided in favour of Global, it was, in theory, not necessary to decide the control issue.

142. The problem with that approach was that it ran the risk of compartmentalizing the evidence, and thereby placing the FTT in breach of their duty to consider the totality of the evidence relevant to the place of supply issue, contrary to the Court of Appeal's guidance in *CCA* and *Davis & Dan*.

143. Whatever the merits of the argument put by Mr McGuiness KC (FTT [600]-[602]) before the FTT and repeated by Mr Hayhurst before us, it is difficult to see how a finding that Mr Malde was in control of Global was not, at the very least, potentially relevant to the place of supply issue. If the FTT had considered this question, and concluded that Mr Malde was in control of Global, and so ought to have been able to produce trading records for Global, this had, at the least, the potential to damage the respondents' case on the place of supply issue.

144. The FTT found, and we agree, that the burden of proof on the place of supply issue was on HMRC. But, it does not follow that a finding that Mr Malde was in control of Global was irrelevant to the place of supply issue. Such a finding would have involved rejection of Mr Malde's assertion that he did not have control of Global. On any view of the matter, the rejection of Mr Malde's assertion that he did not have control of Global would have been damaging to the credibility of Mr Malde, which itself was capable of having an effect on the place of supply issue.

145. We cannot accept the arguments of Mr Webster KC (recorded at FTT [603] – [604].

> (1) Consideration of the issue of control before the place of supply issue would not have had the effect of reversing the burden of proof. It was for HMRC to prove that Global was the supplier in the UK of the alcohol smuggled into the UK. The weight to be given to a finding that Mr Malde had control of Global, but had failed to produce any trading records, was a matter for the FTT. In order to decide what weight to give such a finding, the FTT had first to consider the evidence before it in relation to the issue of control.
>
> (2) It is unclear to us why it was either unfair or inappropriate for the FTT to consider the issue of control on the basis that a finding adverse to Mr Malde may allow an inference to be drawn that his failure to produce records showed that the companies did make supplies in the United Kingdom. We also cannot accept the argument that it was necessary for the FTT to avoid the issue of control because the drawing of this inference "undermines Mr Malde's primary defence – that he did not control the companies and cannot produce any trading records". This was the very point of considering the issue of control. It was for the FTT to decide whether to draw that inference and, if that inference was drawn, to decide what, if any weight should be attached to that inference in relation to the place of supply issue, taking into account where the burden of proof lay.

146. What the FTT was not entitled to do, given its duty to consider the totality of the evidence relevant to the place of supply, was to place the issue of control into a separate compartment, which was left unconsidered when the FTT came to consider the place of supply issue. The place of supply issue was not suitable to be treated as, in effect, a preliminary issue. There was no clear separation between the evidence relevant to place of supply issue and the evidence relevant to the issue of control. The evidence in relation to each issue, at the least, was capable of overlap.

147. In these circumstances, in our view, the FTT did make an error on a point of law, within the meaning of Section 12(1) of the Tribunals, Courts and Enforcement Act 2007 ("TCEA

2007"), in deciding that the issue of place of supply should be determined before the issue of control. The FTT could only make this decision if it was satisfied that there was no possibility of overlap in the evidence relevant to the two issues. Mr Webster KC (at FTT [604]) made the argument that the place of supply issue and the issue of control were separate issues, with no logical connection. The FTT did not however address this question. Its conclusions on the order in which to address the issues was based in its acceptance of the arguments of Mr Webster KC recorded at FTT [603]. The FTT left open the question which it needed to decide, if it was to take the place of supply issue before the issue of control; namely whether it was satisfied that there was no possibility of overlap in the evidence relevant to the two issues.

148. Although we have found an error of law in the FTT Decision, we will not set aside the FTT Decision on this ground. There are two reasons for this.

(1) First, the FTT decided the place of supply issue, in relation to both Global and SA, on a basis which had little connection with the issue of control. In relation to Global, the FTT decided the place of supply issue on the basis that HMRC had failed to prove that Global was the owner of the goods supplied in the UK (FTT [644]). The main reasons for this failure were (i) the evidence of payments to Global by various companies for the alcohol supplied by Global (FTT [638]) and (ii) the evidence that other entities were involved in the supply chains that HMRC's analysis ignored (FTT [643]-[644]). The FTT were not prepared to disregard that evidence, which in turn called into question the place of supply by Global. HMRC had failed to prove that these sales involved the supply of alcohol by Global in the UK, as opposed to on the continent. It is difficult to see how this result would have been any different if the FTT had decided that Mr Malde did or did not have control of Global before addressing the place of supply issue.

(2) Second, it is clear that the FTT did not regard Mr Malde as a reliable witness (FTT [83]-[97]). The FTT regarded much of his evidence, including in relation to Global, as unreliable (FTT [83]). There is no reason to believe that the FTT's failure to consider the control issue in advance of the supply issue had a material effect on the FTT's view of the credibility of Mr Malde's evidence in relation to the place of supply issue.

Conclusion

149. For these reasons, while we agree with HMRC that the FTT's decision on the order of issues did involve an error of law, in our view, it was not material to its decision on the place of supply issue, which is the focus of Ground 2.

150. We will not therefore set aside the FTT Decision on the basis of Ground 2.

GROUND 3: CONCLUSIONS INCONSISTENT WITH THE UNDERLYING EVIDENCE

151. Ground 3 is that the FTT's conclusion (at FTT [643]) that Adrena "supplied" the alcohol in the UK (and that Global did not) is demonstrably inconsistent with the underlying evidence.

Background

152. Once again, the focus of this ground is on the FTT's conclusions on the place of supply issue. HMRC acknowledge that this ground is a challenge to the FTT's findings of fact. In essence, HMRC say that the evidence clearly demonstrates that Global supplied alcohol in the

UK and that the FTT's findings to the contrary were inconsistent with the evidence to such an extent that it was not open to the FTT to make such findings.

The FTT decision

153. The key section of the FTT Decision to which HMRC refer is at FTT [638]-[644]. These paragraphs contain the FTT's reasoning that leads to its conclusion on the place of supply issue in relation to Global – namely that, in the absence of evidence that Global was the owner of goods supplied in the UK, the FTT was unable to find that Global was liable to be registered for VAT. The relevant paragraphs are set out below.

> 638. In their written closing submissions Mr Webster and Mr Gurney say:
>
> > "Perhaps the clearest evidence of the destination of the alcohol supplied by Global are the payments received from its customers. Putting to one side the funds received from Adrena, which are alleged to relate to the cover loads and which supplies are accepted to have occurred in the EU, Global received substantial sums from the following UK incorporated companies: Ramstrad; Alexsis; Hobbs; Corkteck; Best Buys; Sea Inn Foods; and Universe.
> >
> > It is the Respondents' case that those payments represent the flow of funds to Global in relation to the alcohol it had supplied, which had eventually been slaughtered in the United Kingdom. The Appellants do not challenge that suggestion, which seems likely, from the evidence before the Tribunal. However, the crucial issue is the location of the supplies of alcohol for which payment was made."
>
> We agree that that this is indeed the crucial issue given that, as described above, there were undisputed payments to Global from those companies.
>
> 639. At one point in his oral closing submissions Mr McGuinness appeared to suggest that if Global had made the decision to smuggle alcohol into the United Kingdom there could not be any commercial arm's length transaction between Global and any other company, either Adrena or a cash and carry in Calais, as any such transaction would be a sham as this would be the smuggling enterprise in operation. He says the Banjax convictions and the money flows that have been proven to have taken place are "potent evidence" that Global was a smuggler of alcohol that it supplied, not by some innocent intermediary, in the United Kingdom for which it received payments.
>
> 640. When asked by the Tribunal whether by his submission Mr McGuinness meant that, once a decision had been made to smuggle alcohol, any other sale with another company was a sham and should be ignored with the effect that we should find that the goods had been smuggled and sold by Global in the United Kingdom, Mr McGuinness said that there was no evidence of any sale by Global on the continent. He asked rhetorically – what evidence is there that Global sold the goods on the continent? Where is the evidence that Global sold to someone who then immediately themselves or via another intermediary smuggled the goods into the United Kingdom?
>
> 641. He did however, refer to evidence that he said corroborated that the Global was owner of the alcohol saying:
>
> > "… moving on now from the SA period to the Global period – when there were seizures during the Global period, the claim to ownership of the seized goods did not come from another entity, it came in each case from Adrena, which, as you know, it is HMRC's case is effectively a company

> that is controlled by Global, and hence by Mr Malde. So, the proof of the pudding is in the eating. If, as sometimes happens, goods smuggled do not make it in and they are intercepted and then seized, surely one would expect to see the owner of the goods come forward and seek their return? In the earlier period it was always SA, and in the later period it was always Adrena, for the simple reason that Adrena was being used for the purposes of the cover loads."
>
> 642. However, as Mr Webster submits, even if Global was knowingly involved in illegality by selling alcohol in the European Union to United Kingdom traders, or to an OCG that Global knew intended to smuggle those goods, that is not enough. It is a too broad brush approach. Although HMRC contend that Mr Malde controlled SA and Global and through them Golden Apple, Galac and Adrena and made non-commercial arrangements, in that he is effectively selling to himself, as Mr Webster contends, the choice of SA and Global as the taxable entities is dependent upon a decision to ignore the involvement of the other corporate entities and the reality is that either Golden Apple, Galac and Adrena existed and played their role or, contrary to the evidence, they had no legal existence and can therefore be disregarded.
>
> 643. While there is no evidence before us as to the company law of any of the jurisdictions in which these various companies were established or operated, there is no suggestion that the theory of the effect of incorporation is different and no evidence to support that either. Therefore, it is necessary to treat the various corporate entities as having their own legal identity which cannot be disregarded. Accordingly, and applying the same process as we did with SA, it would appear that Adrena, not Global, owned the alcohol seized in the United Kingdom and that it supplied the alcohol that was sold.
>
> 644. As such, and in the absence of evidence that Global was the owner of the goods that were supplied in the United Kingdom we are unable to find that it was liable to be registered for VAT.

The parties' submissions in outline

154. Mr Hayhurst for HMRC acknowledges that this ground of appeal is an *Edwards v Bairstow*[5] challenge. It is HMRC's case that no tribunal properly instructed as to the relevant law could have come to the determination under appeal on the basis of the evidence before it.

155. As a starting point, Mr Hayhurst says that there is no evidence that Adrena (and not Global) supplied the alcohol that was the subject of the mirror loads in the UK as suggested by the FTT (at FTT [643]). The FTT failed properly to distinguish between the cover loads (imported by Adrena) and the mirror loads. Before the FTT, neither party was advancing a positive case that Adrena imported the alcohol that formed the mirror loads. It was HMRC's case that the mirror loads were smuggled into the UK by Global. It was the respondents' case that the alcohol may have been smuggled into the UK by the participants in Operation Banjax or that it may have been owned by Corkteck when it was imported into the UK.

156. Mr Hayhurst says that the overwhelming evidence points to the mirror loads being smuggled into the UK by Global. He took us to large parts of the evidence that was before the FTT relating to the supply chains for the transactions in which Global was involved in support of this submission. In summary, he made the following points.

[5] *Edwards (Inspector of Taxes) v Bairstow* [1956] AC 14

(1) The FTT found that SA smuggled alcohol into the UK by means of inward diversion fraud over a period of up to eight years (FTT [626]-[637]). Global was the undisputed "successor" to SA's trade (FTT [300], [600]).

(2) The FTT found, and the respondents conceded, that Global owned significant amounts of alcohol that it had purchased from various companies in continental Europe, (FTT [303], [304], [308]). These purchases included purchases of alcohol from Adrena to the value of £8.1 million. There was no evidence that Global sold alcohol to Adrena, with the exception of £970,000 of alcohol, which Mr Hayhurst asserted, related to the cover loads.

(3) The evidence did not support Global's claims that it sold alcohol to a variety of EU-based wholesalers and traders (FTT [310]-[318]). Whilst the transportation documentation suggested that such sales may have taken place, there was no evidence of Global having received payments from such wholesalers and traders.

(4) The FTT was aware of evidence of the movement of lorries transporting alcohol which, in accordance with the relevant documentation, should have been delivered by Global to wholesalers and traders in the EU, but, in fact, showed that those lorries were in the UK at relevant times (FTT [312]-[317]).

(5) Global received substantial payments from persons associated with the organized crime group responsible for Operation Banjax, an organized crime group involved in the laundering of money derived from alcohol diversion fraud (FTT [421]). The paperwork suggested that Global sold non-alcoholic goods for payment to traders controlled by participants in Operation Banjax. The likelihood was that these payments represented the laundered proceeds of inward diversion fraud in which Global was involved.

(6) The evidence showed that Adrena played a limited role in the inward diversion fraud. Adrena's only roles were (i) to sell alcohol to Global in the EU (see above) and (ii) to act as a "buffer" company in relation to the cover loads, the mirror loads for which were sold by Global in the UK. There was no evidence that Global sold the alcohol for the mirror loads to Adrena in the EU and that Adrena smuggled those goods into the UK (as the FTT's reasoning suggested).

157. Mr Webster KC for the respondents says that this ground of appeal represents a challenge to the FTT's findings of fact. He referred to the guidance of Lewison LJ in *Volpi v Volpi* [2022] EWCA CIV 464 ("*Volpi*") at [2], which highlighted the difficulties for an appellate court or tribunal in reassessing the findings of fact made by the fact-finding tribunal, and the dangers for an appellate court of interfering with a decision of the fact-finding tribunal on these grounds.

158. Mr Webster KC said that, in any event, HMRC's argument was misplaced. The FTT did not make a definitive finding that Adrena (and not Global) had sold alcohol in the UK. The FTT's only conclusion was that there was insufficient evidence before it that Global owned goods in the UK (FTT [644]). The reference to Adrena owning goods in the UK (FTT [643]) was merely a reference to the possibility that Adrena might have held the goods. It was not a finding of fact.

159. Mr Webster KC also pointed to various deficiencies in HMRC's case before the FTT including the following.

(1) HMRC's case was plagued with difficulties derived from an inadequate investigation and the case officers' failure to appreciate the implications of the separate legal personality of the companies that were involved. HMRC had failed properly to identify the basis on which it was said that Global made supplies in the UK.

(2) The argument that Adrena was a buffer company only in relation to the cover loads on the basis that it appeared as the consignor on the paperwork for the loads that were intercepted by the Border Force was flawed. The ownership of the goods at the UK border could not be determined by what happened at the border. The argument failed to address the fact that Adrena would have had to appear on the paperwork for all the loads (including the mirror loads) if the fraud was to be effective.

(3) It did not follow from the fact that Global owned alcohol in the EU that it must be the supplier of the alcohol in the UK. The evidence presented by Mr Hayhurst – in relation to the transportation of alcohol owned by Global, the extent of Operation Banjax and the sources of funds of Global – was not conclusive of Global having made supplies of alcohol in the UK.

160. Mr Webster KC submitted that the FTT's conclusion on the facts was one that was well within the bounds of reasonable decisions open to the FTT and one that it was entitled to reach on the evidence before it.

Discussion

Relevant case law principles

161. Ground 3 challenges what HMRC says are findings made by the FTT on the evidence. The circumstances in which such a challenge can amount to a question of law rather than fact (and so one which, on appeal, this tribunal is entitled hear) are set out in the judgment of Lord Radcliffe in the House of Lords in *Edwards (Inspector of Taxes) v Bairstow* [1956] AC 14 at p36:

> When the case comes before the court it is its duty to examine the determination having regard to its knowledge of the relevant law. If the case contains anything ex facie which is bad law and which bears upon the determination, it is, obviously, erroneous in point of law. But, without any such misconception appearing ex facie, it may be that the facts found are such that no person acting judicially and properly instructed as to the relevant law could have come to the determination under appeal. In those circumstances, too, the court must intervene. It has no option but to assume that there has been some misconception of the law and that, this has been responsible for the determination. So there, too, there has been error in point of law. I do not think that it much matters whether this state of affairs is described as one in which there is no evidence to support the determination or as one in which the evidence is inconsistent with and contradictory of the determination, or as one in which the true and only reasonable conclusion contradicts the determination. Rightly understood, each phrase propounds the same test. For my part, I prefer the last of the three, since I think that it is rather misleading to speak of there being no evidence to support a conclusion when in cases such as these many of the facts are likely to be neutral in themselves, and only to take their colour from the combination of circumstances in which they are found to occur.

162. The problems with appeals of this kind have been identified repeatedly by appeal courts. In his submissions, Mr Webster KC directed our attention to the judgment of Lewison LJ in *Volpi*, where Lewison LJ summarized the relevant principles in the following terms (at *Volpi* [2]):

> 2 The appeal is therefore an appeal on a pure question of fact. The approach of an appeal court to that kind of appeal is a well-trodden path. It is unnecessary to refer in detail to the many cases that have discussed it; but the following principles are well-settled:
>
> (i) An appeal court should not interfere with the trial judge's conclusions on primary facts unless it is satisfied that he was plainly wrong.
>
> (ii) The adverb "plainly" does not refer to the degree of confidence felt by the appeal court that it would not have reached the same conclusion as the trial judge. It does not matter, with whatever degree of certainty, that the appeal court considers that it would have reached a different conclusion. What matters is whether the decision under appeal is one that no reasonable judge could have reached.
>
> (iii) An appeal court is bound, unless there is compelling reason to the contrary, to assume that the trial judge has taken the whole of the evidence into his consideration. The mere fact that a judge does not mention a specific piece of evidence does not mean that he overlooked it.
>
> (iv) The validity of the findings of fact made by a trial judge is not aptly tested by considering whether the judgment presents a balanced account of the evidence. The trial judge must of course consider all the material evidence (although it need not all be discussed in his judgment). The weight which he gives to it is however pre-eminently a matter for him.
>
> (v) An appeal court can therefore set aside a judgment on the basis that the judge failed to give the evidence a balanced consideration only if the judge's conclusion was rationally insupportable.
>
> (vi) Reasons for judgment will always be capable of having been better expressed. An appeal court should not subject a judgment to narrow textual analysis. Nor should it be picked over or construed as though it was a piece of legislation or a contract.

163. In *Georgiou (trading as Mario's Chippy) v Customs and Excise Commissioners* [1996] STC 463 ("*Georgiou*"), Evans LJ explained how challenges to findings of fact made by a first instance tribunal, on the basis of *Edwards v Bairstow*, should be framed. In his judgment, at 476e-g, Evans LJ began by striking the following cautionary note:

> It is right, in my judgment, to strike two cautionary notes at this stage. There is a well-recognised need for caution in permitting challenges to findings of fact on the ground that they raise this kind of question of law. This is well seen in arbitration cases and in many others. It is all too easy for a so-called question of law to become no more than a disguised attack on findings of fact which must be accepted by the courts. As this case demonstrates, it is all too easy for the appeals procedure to the High Court to be misused in this way. Secondly, the nature of the factual inquiry which an appellate court can and does undertake in a proper case is essentially different from the decision-making process which is undertaken by the tribunal of fact. The question is not, has the party upon whom rests the burden of proof established on the balance of probabilities the facts upon which he relies, but, was there evidence before the tribunal which was sufficient to support the finding which it made?

> In other words, was the finding one which the tribunal was entitled to make? Clearly, if there was no evidence, or the evidence was to the contrary effect, the tribunal was not so entitled.

164. Evans LJ then went on, at 476h-j, to explain what an appellant needed to establish, in order to demonstrate that a point of law arose in relation to a finding of fact made by the first instance tribunal:

> It follows, in my judgment, that for a question of law to arise in the circumstances, the appellant must first identify the finding which is challenged; secondly, show that it is significant in relation to the conclusion; thirdly identify the evidence, if any, which was relevant to that finding; and, fourthly, show that that finding, on the basis of that evidence, was one which the tribunal was not entitled to make. What is not permitted, in my view, is a roving selection of evidence coupled with a general assertion that the tribunal's conclusion was against the weight of the evidence and was therefore wrong. A failure to appreciate what is the correct approach accounts for much of the time and expense that was occasioned by this appeal to the High Court.

Application to the facts of this case

165. With those principles in mind, we turn to the issues in this case. We should say at the outset that, as is clear from the case law authorities to which we have referred, challenges of this nature to the decisions of first-instance tribunals face significant substantive and procedural hurdles. For the reasons that we set out below, in our view, HMRC has not overcome those hurdles in this case.

166. Our starting point is the first stage in the process outlined in Evans LJ's judgment in *Georgiou*, which requires an appellant to identify the relevant finding of fact which is being challenged. This ground of appeal assumes that the FTT made a finding that Adrena supplied the alcohol in the UK, but should have made a finding that Global supplied the alcohol in the UK. HMRC say the relevant finding is found in FTT [643] where the FTT states that "it would appear that Adrena, not Global, owned the alcohol seized in the United Kingdom and that it supplied the alcohol that was sold". Mr Hayhurst says that the FTT's words "it would appear" are coloured by the words "As such" at the beginning of FTT [644], which demonstrate that the FTT's conclusion – that Global was not required to be registered for VAT – was based on that finding.

167. We do not agree. In our view, it is clear from the FTT's use of the words "it would appear" that this is not a finding of fact that Adrena supplied the alcohol that was sold in the UK. It is simply a statement of what the evidence suggests to the FTT may be the position. Rather, it is clear from FTT [644] that the FTT's view was that the evidence before it was inconclusive and certainly insufficient to support a finding that Global supplied the alcohol in the UK. This was the reason for the FTT's conclusion in FTT [644] that "in the absence of that Global was the owner of the goods that were supplied in the United Kingdom we are unable to find that it was liable to be registered for VAT". The FTT reached that view having heard all the evidence. We have not. We are in no position to interfere with the FTT's conclusion.

168. In our view, this ground of appeal therefore fails at the first hurdle. But even if we were to accept that the FTT made a relevant finding of fact that Adrena, and not Global, supplied the alcohol that was sold in the UK, we would not conclude that the FTT was not entitled to reach that finding on the basis of the evidence before it.

169. We can illustrate the difficulties in HMRC's case by reference to the examples from the evidence to which we were taken by Mr Hayhurst.

170. Mr Hayhurst points to the fact that it was accepted by the respondents, and found by the FTT (at FTT [300]), that Global was the "successor" to SA's business. The FTT found that SA supplied alcohol in the UK (FTT [637]). The suggestion was that Global must therefore also have supplied alcohol in the UK. The fundamental difference was, however, that, in the period during which Global carried on its trade, the evidence showed that Adrena was inserted into the supply chain as a "buffer company" and sold goods to Corkteck. On HMRC's case, of course, Adrena was inserted into the supply chain only in relation to the cover loads (see the evidence of Mr Foster at FTT [525]). But there was no direct evidence that Global supplied the mirror loads in the UK, and there were material difficulties in HMRC's case that Adrena's involvement was limited to the cover loads (to which we refer below). Against that background, and in the light of the FTT's concerns about the failures of HMRC to address properly the separate personality of the entities involved, a conclusion that Adrena may have supplied the alcohol in the UK was one that was open to the FTT.

171. We were also taken by Mr Hayhurst to the evidence that was before the FTT that Global acquired significant amounts of alcohol from traders and wholesalers in the EU. This evidence included details of the acquisition of alcohol worth £8.1 million from Adrena. It was not disputed by the respondents that Global acquired significant amounts of alcohol in the EU. However, Mr Hayhurst also directed our attention to evidence of sales of alcohol by Global which according to records in the EU Excise Movement and Control System (EMCS) were made to EU-based traders and wholesalers. Mr Hayhurst suggested that these sales were fictitious and the alcohol was actually smuggled into the UK by Global. He pointed to the fact that these sales were not reflected in banking, transportation or warehouse records and to evidence, which was also before the FTT, of the movement of lorries purportedly transporting alcohol to traders and wholesalers in the EU, which were at the relevant times in the UK. Mr Hayhurst asserted that the FTT had ignored this evidence, which, he submitted, demonstrated that the alcohol was in fact smuggled into the UK by Global.

172. We do not agree. Far from ignoring this evidence, much if not all of the evidence to which Mr Hayhurst referred was faithfully recorded by the FTT in the FTT Decision (see, in particular, FTT [301] – [326]). We do not need to revisit it in detail here. The simple point is that whilst it may have been open to the FTT to draw the inference that Mr Hayhurst invited us to draw, there was no direct evidence that Global supplied alcohol in the UK. Given the FTT's reservations about the details of HMRC's case, it was equally open to the FTT to reach an alternative conclusion.

173. On a related point, Mr Hayhurst referred to the fact that Global received substantial payments from the participants in Operation Banjax. Mr Hayhurst submitted that these payments represented the proceeds of sale of alcohol by Global in the UK, which had been laundered by Operation Banjax. This was on the basis that Operation Banjax was, in Mr Hayhurst's words, a "paperwork factory" involved in the creation of fictitious transactions designed to justify the proceeds of diversion fraud being transferred by Operation Banjax to Global.

174. The relevance of this submission was, as we understand it, in relation to the parties' differing explanations of the possible destinations for the substantial amount of alcohol that Global acquired in the EU. In short, it was HMRC's case that Global smuggled the alcohol into the UK (in the mirror loads) and the proceeds of that smuggling operation were then

laundered through fictitious transactions created by Operation Banjax. The respondents did not advance a positive case in relation to the place of supply, but did suggest in their submissions that at least one explanation was that the alcohol was sold to participants in Operation Banjax and then perhaps smuggled into the UK by them. HMRC's response to that suggestion was that the participants in Operation Banjax were not involved in smuggling alcohol.

175. In support of his explanation, Mr Hayhurst referred us to the FTT Decision at FTT [624], where the FTT recorded the parties' submissions:

> 624.We should also mention the difference between the parties with regard to Operation Banjax. Mr Webster contends that the Banjax OCG was, in addition to providing the paperwork for the fraud, also itself responsible for the smuggling of the alcohol concerned, something to which Ms Myers had agreed in evidence (see paragraph 434, above). Mr McGuinness, relying on the sentencing remarks at the conclusion of the first Banjax trial (see paragraph 420, above), submits that none of the Banjax defendants were involved in the "large-scale movement of smuggled" alcohol but provided the "paper transactions" to "clean the stock" so that it appeared to have been "purchased legitimately".

176. There is typographical error in FTT [624]. The cross-reference to FTT [434] should be to FTT [436], where the FTT recorded the evidence from Ms Myers, an officer in HMRC's Fraud Investigation Service, who was a witness for HMRC at the hearing. Ms Myers gave evidence, on which she was cross examined at some length, in relation to Operation Banjax, in relation to which Ms Myers was the Lead Disclosure Officer. The FTT said this at FTT [436]:

> 436.While the prosecution case in Banjax was that the role of the defendants was to supply the false paper trail, Ms Myers agreed, when it was put to her, that the OCG "undoubtedly" acquired illicit alcohol which it supplied to the cash and carries through either the final company or penultimate company in the chain.

177. Mr Hayhurst submitted that, at FTT [624], the FTT overstated the evidence of Ms Myers, as recorded in FTT [436]. In order to make good this submission, we were then taken by Mr Hayhurst to the transcript of Ms Myers' evidence before the FTT, where Mr Hayhurst drew our attention to the following exchange:

> Q. Can we, in the light of that exchange and the way in which the case proceeded thereafter, summarise the prosecution case in this way: that the organised crime group undoubtedly acquired illicit alcohol?
>
> A. Yes.

178. Mr Hayhurst submitted that this evidence had to be seen in the context of a number of other answers given by Ms Myers earlier in her cross-examination, where Ms Myers stressed that the role of the organized crime group in Operation Banjax was to provide paperwork to document fictitious supply chains, the aim being to launder the proceeds of the sale of the illicit alcohol. In that context, he submitted that the answer set out above should have been taken as a reference to the false paperwork provided by the organized crime group and that there was no evidence of the group actually handling goods.

179. Mr Webster KC, however, took us to other extracts from the evidence of Ms Myers, which appeared to show that Ms Myers did indeed give evidence in which she accepted that

significant quantities of alcohol were smuggled into the UK by the participants in Operation Banjax.

180. FTT [436] replicates the evidence of Ms Myers to which we have referred above. It is reasonable to assume that the FTT had this evidence in mind when they wrote FTT [436]. Having reviewed the extracts from Ms Myers's evidence to which we have been referred, we can see nothing wrong in the way in which the FTT recorded this evidence in FTT [436] or summarized the positions of the parties at FTT [624]. The suggestion that the FTT overstated the position is untenable, given that the FTT almost directly quoted what Ms Myers had said.

181. The point is a relatively minor one in the context of the mass of evidence that was before the FTT. However, to our minds, it vividly illustrates the difficulties inherent in this ground of appeal. HMRC's case is that the evidence of Ms Myers as recorded by the FTT has to be read in the context of the entirety of her evidence and the other evidence in this case. We have no means of properly judging that context. The FTT heard all of Ms Myers's evidence, and all the other evidence in the case. They were well-placed to decide on the implications of Ms Myers's evidence in its proper context. We are not. The rival submissions of counsel on this particular point simply demonstrate that it is possible, by taking edited extracts from the evidence, to argue for different versions of that context. All this does is to emphasize the difficulties in arguing that the FTT, who heard all the evidence, should have put a different interpretation on the evidence of Ms Myers, as recorded in FTT [436] and FTT [624].

182. The final specific point that we will address in relation to this ground of appeal is HMRC's assertion that the FTT failed to appreciate or engage with the distinction between the cover loads and the mirror loads and, in doing so, failed to appreciate that Adrena was inserted as a buffer company for the purposes only of the cover loads. Mr Hayhurst criticises the FTT for placing considerable weight on the fact that the paperwork for the cover loads that were intercepted by the Border Force named Adrena as the consignor and that it was Adrena that challenged the interception of the goods at the border. Mr Hayhurst says that this focus caused the FTT to ignore the weight of the other evidence – to which we have referred to above – that Global owned the alcohol that comprised the mirror loads.

183. Even if we were to accept that the FTT made a finding that Adrena supplied the alcohol comprised in the mirror loads in the UK – which we do not – the fact remains that HMRC have failed to address at any stage the issue raised by the respondents that if Adrena was named as the consignor of the cover loads in the relevant paperwork, for the fraud to work, Adrena must also have been named as the consignor on the paperwork for the mirror loads. A firm conclusion that Adrena was not the consignor in relation to the mirror loads would have involved the proposition that the identity of the consignor had changed *ex post facto* depending upon whether or not an interception had taken place. HMRC failed to provide a coherent answer to that point.

184. Furthermore, HMRC's suggestion that the respondents' acceptance that Global had acquired significant amounts of alcohol in the EU was inconsistent with Global not being the first supplier of the alcohol in the UK was clearly a non-sequitur. Equally, it did not follow that because Adrena supplied some alcohol to Global in the EU, the alcohol imported into the UK was the same alcohol, nor that Adrena was not the supplier of alcohol in the UK. The FTT was fully aware of the supplies in the EU but clearly did not find the argument persuasive. Global purchased alcohol from many sources. The fact that it also purchased from Adrena did not prove that Adrena, the named consignor, was not the importing entity.

185. Given the above, and the FTT's clear reservations about the failures of HMRC to engage with the separate personality of the companies involved, the conclusion that Global did not supply alcohol in the UK was one that the FTT was clearly entitled to reach and one with which we cannot interfere.

Conclusion

186. For all of the above reasons, Ground 3 must fail. We cannot say that the FTT's conclusion on the primary facts was "plainly wrong" in the terms of being a conclusion which no reasonable tribunal could have reached – to adopt the words of Lewison LJ in *Volpi*.

187. Furthermore, in the present case the process outlined by Evans LJ in *Georgiou* was clearly not followed. This was because HMRC were forced to contend that, on the basis of the entirety of the evidence, the FTT should have found as a fact that Global supplied the alcohol in the UK. The appeal did not therefore, so far as this ground of appeal was concerned, focus upon a particular finding of fact in respect of which it could be said that the FTT were not entitled to make that finding. The challenge was necessarily a general assertion that the conclusion of the FTT was against the weight of the evidence and therefore wrong. That is precisely the type of challenge against which Evans LJ cautioned in *Georgiou*.

188. We dismiss the third ground of appeal.

GROUND 4: BREACH OF "BEST JUDGMENT" REQUIREMENT

GROUND 5: ERROR TO SET ASIDE THE ENTIRE ASSESSMENT

189. Ground 4 is that it was an error of law for the FTT to conclude that there was a breach of the "best judgment" requirement in section 73 VATA.

190. Ground 5 is that, even if there was a breach of the "best judgment" requirement in relation to some element of the assessment, it was an error of law to set aside the whole assessment rather than correcting the amount to a fair figure.

Background

191. Whilst respecting them as separate grounds, it is convenient to address these two grounds of appeal together. There are various reasons for this: the grounds are pleaded in the alternative; both of the grounds relate to the section of the FTT Decision headed "Quantum"; and both grounds of appeal relate to the same legislation and engage principles derived from the same authorities.

192. We should record at the outset that these grounds of appeal relate only to the appeal against the DLN and concern only the quantum of the underlying assessment made under section 73 VATA against SA, against which SA did not appeal. As we have described above, in the course of argument, Mr Webster KC acknowledged that the burden of proof on the issue of the quantum of the assessment fell on the taxpayer in the context of a penalty appeal made under section 60 and section 61 VATA. That conclusion is consistent with the analysis in the judgment of Carnwath LJ in *Khan* and with our analysis above.

193. For the reasons that we have given above, the appeals against the other assessments and liability notices succeeded before the FTT on the place of supply issue, and so the FTT did not

need to address the application of the "best judgment" requirement to the assessments that underlie the registration penalty issued to Global or the various PLN's issued to Mr Malde.

Relevant case law principles

194. It will assist our explanation if we begin our discussion by setting out the relevant case law principles. There is no material dispute between the parties on the case law principles that should be applied. Their differences relate to the application of these principles to the facts of this case.

195. We have been referred by the parties to various case law authorities on the application of section 73 VATA. These included the following decisions of the High Court and Court of Appeal: *Van Boeckel v Customs & Excise Commissioners* [1981] STC 290 ("*Van Boeckel*")], *Rahman* (*t/a Khayam Restaurant*) *v Customs & Excise Commissioners* [1998] STC 826 ("*Rahman No. 1*"); and *Customs & Excise Commissioners v Pegasus Birds Limited* [2004] EWCA Civ 1015 ("*Pegasus Birds*").

196. We have reviewed the authorities. We set out below the relevant principles that we take from the case law, principally by reference to the decision of the Court of Appeal in *Pegasus Birds*.

197. The principles that we derive from the case law authorities are as follows:

(1) There are two distinct questions which arise where an assessment purports to be made under section 73(1) VATA: first, whether the assessment has been made under the power conferred by that section; and, second, whether the amount of the assessment is the correct amount for which the taxpayer is accountable (*Pegasus Birds* [21], Carnwath LJ citing the judgment of Chadwick LJ in *Rahman (t/a Khayam Restaurant) v Customs & Excise Commissioners (No. 2)* [2002] EWCA Civ 1881 ("*Rahman No. 2*") at *Rahman No. 2* [5]).

(2) The test as to whether an assessment is made to the best of HMRC's judgment is classically set out in the judgment of Woolf J in *Van Boeckel*, at page 292e-293a, where he said this:

> …As to this the very use of the word 'judgment' makes it clear that the commissioners are required to exercise their powers in such a way that they make a value judgment on the material which is before them. Clearly they must perform that function honestly and bona fide. It would be a misuse of that power if the commissioners were to decide on a figure which they knew was, or thought was, in excess of the amount which could possibly be payable, and then leave it to the taxpayer to seek, on appeal, to reduce that assessment.
>
> Secondly, clearly there must be some material before the commissioners on which they can base their judgment. If there is no material at all it would be impossible to form a judgment as to what tax is due.
>
> Thirdly, it should be recognised, particularly bearing in mind the primary obligation, to which I have made reference, of the taxpayer to make a return himself, that the commissioners should not be required to do the work of the taxpayer in order to form a conclusion as to the amount of tax which, to the best of their judgment, is due. In the very nature of things frequently the relevant information will be readily available to the taxpayer, but it will be very difficult for the commissioners to obtain that information without

> carrying out exhaustive investigations. In my view, the use of the words 'best of their judgment' does not envisage the burden being placed on the commissioners of carrying out exhaustive investigations. What the words 'best of their judgment' envisage, in my view, is that the commissioners will fairly consider all material placed before them and, on that material, come to a decision which is reasonable and not arbitrary as to the amount of tax which is due. As long as there is some material on which the commissioners can reasonably act then they are not required to carry out investigations which may or may not result in further material being placed before them.

(3) As to whether an alleged error in an assessment is to be taken as evidence that the assessment was not made to the best of HMRC's judgment, the relevant question is whether the mistake is consistent with "an honest and genuine attempt to make a reasoned assessment of the VAT payable or is of such a nature that it compels the conclusion that no officer seeking to exercise best judgment could have made it" (Chadwick LJ, *Rahman No. 2* [32]).

The relevant principles are set out by Carnwath LJ at *Pegasus Birds* [21], once again referring to the judgment of Chadwick LJ in *Rahman No. 2* at [32]:

> 21. … Having referred with approval (para 31) to my judgment in *Rahman (1)* and that of Dyson J to like effect in *McNicholas Construction Co v Customs & Excise* [2000] STC 553 , he addressed the taxpayer's submission that because the tax due had been found to be less than half the amount of the assessment, the assessment could not have been to "best judgment" (para 32). He regarded that as a "non-sequitur":
>
> > "The explanation may be that the tribunal, applying its own judgment to the same underlying material at the second, or 'quantum', stage of the appeal, has made different assumptions — say, as to food/drink ratios, wastage or pilferage — from those made by the commissioners. As Woolf J pointed out in *Van Boeckel* ([1981] STC 290 at 297), that does not lead to the conclusion that the assumptions made by the commissioners were unreasonable; nor that they were outside the margin of discretion inherent in the exercise of judgment in these cases. Or the explanation may be that the tribunal is satisfied that the commissioners have made a mistake — that they have misunderstood or misinterpreted the material which was before them, adopted a wrong methodology or, more simply, made a miscalculation in computing the amount of VAT payable from their own figures. *In such cases — of which the present is one — the relevant question is whether the mistake is consistent with an honest and genuine attempt to make a reasoned assessment of the VAT payable; or is of such a nature that it compels the conclusion that no officer seeking to exercise best judgment could have made it. Or there may be no explanation; in which case the proper inference may be that the assessment was indeed arbitrary*." (emphasis added)
>
> That formulation of the "relevant question" was part of the ratio of the decision in that case; it is binding on us, and on the Tribunal in future cases.

Carnwath LJ also counselled against seeking to refine or adapt the test set out by Chadwick LJ in *Rahman No. 2*. He said this at *Pegasus Birds* [22]:

> 22. In the light of that authoritative statement of the law, I would caution against attempts to refine or add to it, by reference to individual sentences or phrases from previous judgments. In *Rahman (1)*, as already noted I listed a number of phrases used in earlier cases as "examples", to illustrate that the

test was higher than was being submitted by the taxpayer. I added that the tests were "indistinguishable from the familiar *Wednesbury* principles". In retrospect, I think the reference to *Wednesbury* principles was unhelpful and a possible source of confusion, and may raise as many questions as it answers (see the comments of Neill LJ in *John Dee Ltd v Customs & Excise* [1995] STC 941, 952; and of the Tribunal in *W H Smith Ltd v Customs & Excise* [2000] V&DR 1 para 124). Another phrase (used by Woolf J in *Van Boeckel*) referred to the obligation of the commissioners "fairly (to) consider all material placed before them". As a general proposition that is uncontroversial. However, it should not be seen as providing a separate and sufficient test of the invalidity of the assessment, nor as justifying lengthy cross-examination to establish whether the relevant officers have in fact looked at all the available material. Even the term "wholly unreasonable" (also used in *Van Boeckel*) may be misleading if it is treated as a separate test, rather than as simply an indication that there has been no "honest and genuine attempt" to make a reasoned assessment.

(4) There are, however, dangers in an over-rigid adherence to a two-stage approach (i.e. first, validity; second, quantum) to a challenge to a best judgment assessment. The important issue for the tribunal is the amount of the assessment. These dangers are highlighted by Carnwath LJ in *Pegasus Birds* at [18]-[19] in which he comments on his decision in the High Court in *Rahman No. 1* as follows:

18. Before me, Mr Barlow for the Commissioners had supported the practice as a discipline for officers, which was well understood and gave rise to little difficulty in practice. I expressed my concerns:

"I accept the importance of the discipline, and I also acknowledge the desirability of not upsetting established practice without good reason. In principle there is nothing wrong in the Tribunal considering the validity of the assessment as a separate and preliminary issue, when that is raised expressly or implicitly by the appeal, and, as part of that exercise, applying the *Van Boeckel* test. *There is a risk, however, that the emphasis of the debate before the Tribunal will be distorted. If I am right in my interpretation of Van Boeckel, it is only in a very exceptional case that an assessment will be upset because of a failure by the Commissioners to exercise best judgment. In the normal case the important issue will be the amount of the assessment. The danger of the two-stage approach is that it reverses the emphasis …*" (p 836, emphasis added)

19. In that case, the two-stage approach was applied in such a way that one of the Tribunal, having dissented from the chairman's correct decision (as I found) on the best judgment issue, then wrongly regarded himself as having no further part to play in the consideration of the amount of the assessment. I held that the case had to be remitted to the Tribunal. I concluded:

"This case illustrates the dangers of an over-rigid adherence to the two-stage approach. I do not wish to diminish in any way from the importance of guidance given by Woolf J to inspectors as to how to exercise their best judgment when making assessments. However, when the matter comes to the Tribunal, it will be rare that the assessment can justifiably be rejected altogether on the ground of a failure to follow that guidance. The principal concern of the Tribunal should be to ensure that the amount of the assessment is fair, taking into account not only the Commissioners' judgment but any other points that are raised before them by the appellant." (p 840)

(5) It is implicit in the preconditions for the making of an assessment under section 73 (and the rights of appeal in section 83(1)(p) VATA) that, even where the best judgment requirement is breached, the tribunal has the power either to set aside the assessment or to reduce it to the correct figure on the evidence before it.

This is explained by Carnwath LJ in *Pegasus Birds* at [23]:

> 23. Even if it is established that there has been a breach of the "best of their judgment" requirement in relation to some element of the assessment, it does not follow in my view that the whole assessment should be set aside. We were not referred to any case where this issue has been considered in the higher courts, no doubt because in none of the reported cases in those courts was a finding of breach upheld.

(6) The primary task of the tribunal in a challenge to a best judgment assessment is to find the correct amount of tax, so far as possible on the material available to it, bearing in mind that the burden remains on the taxpayer. The tribunal should not automatically treat a "best judgment" challenge as an appeal against the assessment of such, rather than against the amount. Even if the process of assessment is found defective in some respect, the question remains whether the defect is so serious or fundamental that justice requires that the whole assessment be set aside, or whether justice can be done simply by correcting the amount to which the tribunal finds to be a fair figure on the evidence before it.

The relevant principles are set out by Carnwath LJ at *Pegasus Birds* [28]-[29] as follows:

> 28. Where, however, the complaint in substance is not against the assessment as such, but is that the amount has not been arrived at by "best of their judgment", I see nothing in the statute or in principle which requires the whole assessment to be set aside. Clearly much will depend on the nature of the breach. We were told by Miss Foster that the Commissioners would not seek to defend an assessment which was arrived at dishonestly in any respect. That is understandable as a matter of public policy. However, the issue facing the Tribunal is unlikely to be so clear-cut. Fortunately in this country, sustainable allegations of actual fraud or corruption on the part of public officials are likely to be very rare indeed. What is much more likely is an allegation that, in "the heat of the chase" of an apparent wrongdoer, the officers concerned have, consciously or unconsciously, cut corners or closed their minds to relevant material. Defining the boundaries of "dishonesty" in such cases is notoriously difficult (cf *Twinsectra Ltd v Yardley* [2002] 2 AC 164 , 170).
>
> 29. In my view, the Tribunal, faced with a "best of their judgment" challenge, should not automatically treat it as an appeal against the assessment as such, rather than against the amount. Even if the process of assessment is found defective in some respect applying the *Rahman (2)* test, the question remains whether the defect is so serious or fundamental that justice requires the whole assessment to be set aside, or whether justice can be done simply by correcting the amount to what the Tribunal finds to be a fair figure on the evidence before it. In the latter case, the Tribunal is not required to treat the assessment as a nullity, but should amend it accordingly.

He set out the following guidance for tribunals at *Pegasus Birds* [38]:

> 38. In the light of the above discussion, I would make four points by way of guidance to the Tribunal when faced with "best of their judgment" arguments in future cases:
>
> > i) The Tribunal should remember that its primary task is to find the correct amount of tax, so far as possible on the material properly available to it, the burden resting on the taxpayer. In all but very exceptional cases, that should be the focus of the hearing, and the Tribunal should not allow it to be diverted into an attack on the Commissioners' exercise of judgment at the time of the assessment.
> >
> > ii) Where the taxpayer seeks to challenge the assessment as a whole on "best of their judgment" grounds, it is essential that the grounds are clearly and fully stated before the hearing begins.
> >
> > iii) In particular the Tribunal should insist at the outset that any allegation of dishonesty or other wrongdoing against those acting for the Commissioners should be stated unequivocally; that the allegation and the basis for it should be fully particularised; and that it is responded to in writing by the Commissioners. The Tribunal should not in any circumstances allow cross-examination of the Customs officers concerned, until that is done.
> >
> > iv) There may be a few cases where a "best of their judgment" challenge can be dealt with shortly as a preliminary issue. However, unless it is clear that time will be saved thereby, the better course is likely to be to allow the hearing to proceed on the issue of amount, and leave any submissions on failure of best of their judgment, and its consequences, to be dealt with at the end of the hearing.

The FTT Decision

198. The FTT began the section of its decision headed "Quantum" by addressing a question relating to the interaction of section 73 VATA and the civil evasion penalty provisions in section 60 and section 61 VATA. The FTT concluded (at FTT [656]) that the "best judgment" principles were relevant to determine the amount of VAT "evaded or sought to be evaded" for the purposes of section 60 VATA. There is no challenge to that conclusion in these appeals.

199. The FTT then set out the case law principles applicable to best judgment assessments (FTT [657]-[660]). We did not understand there to be any material disagreement between the parties as to the principles which should be applied, nor is there any argument that the FTT did not identify the correct principles.

200. The relevant passage to which these grounds of appeal refer is at FTT [661]-[664]. We have set out the passage below once again, for ease of reference:

> 661. In the present case, as was clear from their written opening submissions, the appellants set out their challenge to Mr Foster's "best of their judgment" assessments long before the commencement of the hearing, indeed this was questioned by Mr Simmonite in the 2014 Report (see paragraph 538, above). Accordingly, the first question for us is whether Mr Foster rejected material available to him on the basis that he had closed his mind to the possibility that it might be credible or, to adopt the words of Woolf J, did Mr Foster "fairly consider all material" before him when making the assessment against SA?
>
> 662. Although he failed to engage with, or even consider, the critical analysis of the York Wines SAGE records undertaken by Mr Simmonite, as this information post-dated the assessment, it cannot have a bearing on whether it

> was made to the best of his judgement. However, the same cannot be said to the York Wines bank statements. Mr Foster confirmed in evidence were in his, or at the very least his team's, possession at the time he made the assessment against SA. As he said, he did not look at these bank statements as it was "something that didn't occur to me at the time."
>
> 663. Mr Foster, whose evidence that he "was mindful of the nature of a best judgment assessment" shows that he was clearly aware of the *Van Boeckel* criteria when he said that he did not "choose" not look at the bank statements and that it was not a case of "looking at them and ignoring them" (see paragraph 534, above), must have made a deliberate decision not to have taken the York Wines bank statements into account. To say otherwise, as he did, is in our view yet another example of the combative, evasive and obstructive nature of how he gave evidence. In any event it is clear that, no matter how it is described, he simply did not "fairly consider" all the material in his possession no matter how relevant it was and did not even consider its credibility but, having reached a conclusion in relation to the assessment schedule decided to stick with it come what may.
>
> 664. Given the seriousness of Mr Foster's failure to consider or even evaluate the material before him, it must follow that not only can the assessment against SA not have been made to the best of his judgment but that had it been appealed by SA it would have been necessary, in the interests of justice, for it to have been set aside. As Mr McGuinness fairly accepted, if we came to such a conclusion, because the assessment was the foundation for the s 61 VATA penalty our decision in relation to the assessment would necessarily feed into that separate determination with the result that the appeal, by Mr Malde, against the penalty under s 61 VATA must succeed.

201. As can be seen from this passage, the first question that the FTT identified in its consideration of the assessment on SA was whether Mr Foster had "fairly considered" all the material before him when making the assessment (FTT [661]). The terms of this question were taken from the judgment of Woolf J in *Van Boeckel*.

202. The FTT then highlighted two main deficiencies in Mr Foster's assessment (FTT [662]). The first deficiency was that Mr Foster did not take into account some of the criticisms of the SAGE accounting records of York Wines, which had been raised by Mr Simmonite in his evidence (FTT [486]-[510]). The second was that Mr Foster chose not to refer to certain bank statements of York Wines from periods between 2004 and 2007, although they were available to him. The level of SA's trading with York Wines was, for reasons that we discuss below, critical to Mr Foster's assessment on SA. That assessment was made on the basis of York Wines' SAGE records, but did not reflect information in the bank statements (FTT [553]-[537]).

203. The FTT decided that the relevant failure was Mr Foster's failure to take into account the bank statements. The FTT found as a fact that Mr Foster had made a deliberate decision not to take the statements into account and therefore that Mr Foster did not "fairly consider" all the material in his possession (FTT [663]). These findings led to the FTT's decision – that it would have been necessary to set aside the entire assessment "in the interests of justice" – and so to its conclusion that the appeal against the related penalty must succeed (FTT [664]).

The parties' submissions in outline

204. In their submissions on these grounds, the parties took us in some detail to the evidence before the FTT and the arguments made by the parties before it. We have taken into account

those submissions, but we do not need to recite them in detail here. For present purposes, the following summary will suffice.

205. In relation to Ground 4, Mr Hayhurst for HMRC submits that the FTT made an error of law in concluding that the "best judgment" requirement in Section 73 VATA had been failed.

> (1) It was perverse to conclude that the best judgment requirement was not met simply because HMRC, in the form of Mr Foster, failed to take into account one category of documents, namely the York Wines bank statements. This was particularly the case because, Mr Hayhurst submitted, the information contained in the York Wines bank statements could only have increased the amount of the assessments if it had been taken into account. Any adjustment would have been to the detriment of the taxpayer.
>
> (2) The only relevant test of whether the assessment met the best judgment requirement was whether the mistakes in the assessment were "consistent with an honest and genuine attempt to make a reasonable assessment" (Chadwick LJ, *Rahman No. 2* [32]). There was no other test. It was inappropriate for the FTT to place such reliance on Mr Foster's failure to take into account relevant material (Carnwath LJ, *Pegasus Birds* [22]).
>
> (3) There was no element of dishonesty in this case. Dishonesty on the part of Mr Foster was not pleaded. Mr Foster had decided not to refer to the bank statements knowing that they could only affect the taxpayer adversely. Mr Foster was simply seeking to find the fair figure as required by the case law principles on the basis that a best judgment assessment would almost always be an estimate. The assessment was not arbitrary.

206. In relation to Ground 5, Mr Hayhurst says that the FTT failed to follow the guidance as set out in the case law. The principal aim of the tribunal on a best judgment assessment should always be to determine the correct amount of tax (Carnwath LJ, *Pegasus Birds* [38]). Even if the best judgment requirement was not met, the error did not require the entire assessment to be set aside. Justice could be done simply by adjusting the amount of tax that was payable under the assessment.

207. Mr Webster KC and Mr Gurney made the following submissions on behalf of the respondents.

> (1) In relation to Ground 4, it was wrong to conclude that the FTT reached its conclusion entirely on the basis that Mr Foster failed to take into account one set of evidence, the York Wines bank statements. That submission was misleading. It ignored the other findings of fact made by the FTT of other shortcomings in the assessment.
>
> (2) It was not true that Mr Foster had simply made an honest mistake. It was clear from the FTT Decision, that the FTT took a very dim view of Mr Foster's evidence. It found that he was deliberately misleading (see, for example, FTT [51], [53]-[57]).
>
> (3) The findings of the FTT did not support the submission that Mr Foster was acting with integrity and seeking to find a fair figure. He deliberately ignored relevant evidence and chose to rely upon the SAGE accounting records of a known fraudster.

(4) The information in the York Wines bank statements was relevant to the methodology used by Mr Foster in compiling his assessment. The suggestion that the failure to take into account the information in the York Wines bank statements was generous to the respondents simply missed the point. It was correct to say that, if the information from the bank statements was fed into Mr Foster's calculations, principally the cash/bank ratio, the result would have been detrimental to the taxpayer. However. that analysis ignored the fact that what the information showed was that the entire methodology was questionable and produced outlandish results.

(5) It was also wrong to suggest that the respondents had not questioned Mr Foster's honesty and integrity. They had, both in opening and closing submissions before the FTT. The FTT's findings (see above) demonstrated that the FTT shared the respondents' concerns.

(6) The FTT identified the correct legal test. Given its findings, the FTT was entitled to reach the conclusion that it did – that the entire assessment should be set aside. It was not acting perversely in doing so.

(7) There were other material deficiencies in the methodology adopted by Mr Foster. He failed to take into account significant payments made by SA, which were not for the purchase of alcohol. This called into question the ratios used by Mr Foster that were fundamental to his methodology and to the quantum of the assessment.

Application to the facts of this case

208. These grounds of appeal are pleaded in the alternative, although as is clear from our summary of the case law principles, they are to an extent inter-related. We will address Ground 4 first – that is, that it was an error of law for the FTT to conclude that there was a breach of the "best judgment" requirement in this case.

Ground 4

209. Our starting point is the judgment of Carnwath LJ in *Pegasus Birds*, to which we have referred extensively above. As we have set out above, the relevant test as to whether an assessment is made to the best of HMRC's judgment is "whether the mistake is consistent with an honest and genuine attempt to make a reasoned assessment of the VAT payable; or is of such a nature that it compels the conclusion that no officer seeking to exercise best judgment could have made it" (Chadwick LJ, *Rahman No. 2* [32], as quoted by Carnwath LJ at *Pegasus Birds* [22]). This is an "authoritative statement of the law". Courts and tribunals should not attempt to refine or add to it. Phrases used in other judgments – such as "wholly unreasonable" or a failure "fairly (to) consider all material placed before them" (*Van Boeckel*) – should not be seen as providing a separate and sufficient test of the invalidity of the assessment (*Pegasus Birds* [22]).

210. The FTT found that there was a breach of the best judgment requirement in this case (FTT [644]). The only relevant defect that the FTT identified as forming the basis of its conclusion that the assessment was not in accordance with the best of HMRC's judgment was the decision of Mr Foster not to take the York Wines bank statements into account. The FTT found that that decision was deliberate, but it did not find that Mr Foster was dishonest or guilty of fraud or corruption. If the FTT had taken this view, it would have been reasonable to expect the FTT to make a specific finding to this effect. It did not. The high point of the criticisms of Mr Foster made by the FTT was its finding (FTT [57]) that his evidence in relation to the

assessments was "clearly misleading". It is not clear whether that finding was made in relation to Mr Foster's evidence in relation to the question of lifting the corporate veil, or whether it applied to Mr Foster's evidence as a whole. Whichever it was, the words chosen by the FTT were "clearly misleading", not "dishonest".

211. Mr Webster KC sought to persuade us by reference to the FTT's criticisms of Mr Foster's evidence earlier in the FTT Decision (in particular at FTT [55]-[57]) that, in its conclusions on this issue (at FTT [663]-[664]), the FTT was expressing more widely-based conclusions. We acknowledge that the FTT were highly critical of Mr Foster's evidence, which was characterized at various points as "clearly misleading" (FTT [55]), and "combative, evasive and obstructive" (FTT [663]). But the fact remains that that the FTT were not prepared to find that Mr Foster had been dishonest or guilty of fraud or corruption in relation to his decision to leave the York Wines bank statements out of account. And, despite these findings, the FTT identified only one deficiency in Mr Foster's calculations which, in its view, was relevant to determining whether the best judgment requirement had been met.

212. Against that background, and notwithstanding the FTT's views on the unsatisfactory nature of Mr Foster's evidence, it is perhaps surprising that such a defect – in particular one which, on Mr Hayhurst's submissions, would only have been to the benefit of the taxpayer (see below) – should be regarded by the FTT as "inconsistent with an honest and genuine attempt to make a reasoned assessment" or of such a nature that it "compels the conclusion that no officer seeking to exercise best judgment could have made it" (to adopt the words of Chadwick LJ, *Rahman No. 2* [32]). However, it seems to us, that if we are to reach a firm view on that point, we would need to undertake a detailed review of the process that Mr Foster undertook in reaching his assessment. Although we have heard detailed submissions on some aspects of Mr Foster's approach, we are not in a position to reach a firm view without hearing much more of the evidence that was before the FTT.

213. What is clear, however, is that, in reaching its conclusion, the FTT did not refer back to the words of Chadwick LJ in *Rahman No. 2* [32], which Carnwath LJ regarded as an authoritative statement of the law. Rather, it referred to the words of Woolf J in *Van Boeckel* (failure to "fairly consider") (FTT [663]). That approach was contrary to the clear guidance of Carnwath LJ in *Pegasus Birds* (*Pegasus Birds* [22]), which counselled against the adoption of any test other than that set out by Chadwick LJ in *Rahman No. 2*. The FTT applied the wrong test. The consequence was, in our view, that the FTT placed undue reliance on one particular error in HMRC's assessment. It did not consider the effect of the defect that it had identified on the assessment as a whole and failed, contrary to Chadwick LJ's guidance, to consider the best judgment requirement in the round. In our view, that was an error of law.

214. For this reason, we allow the appeal on Ground 4. As we have identified an error of law in the FTT Decision, we are required by section 12(1) TCEA 2007 to consider whether or not to set aside the FTT Decision. We will return to that issue towards the end of this section.

Ground 5

215. We now turn to Ground 5 – that is whether, even if the FTT was correct to conclude that there had been a breach of the best judgment requirement, the FTT erred in law in setting aside the entire assessment.

216. Our starting point, once again, is the judgment of Carnwath LJ in *Pegasus Birds*. It is clear from Carnwath LJ's judgment that, even if there is a defect in an assessment, which might call into question whether the best judgment requirement was met, it does not follow that the

whole assessment should be set aside (*Pegasus Birds* [23]). Even if the best judgment requirement is not met, the tribunal must ask itself "whether the defect is so serious or so fundamental that justice requires the whole assessment to be set aside, or whether justice can be done simply by correcting the amount to what the tribunal finds to be a fair figure on the evidence before it" (Pegasus Birds [29]). In the vast majority of cases, the correct approach is therefore for the tribunal to adjust the amount of the assessment rather than setting aside the entire assessment. This is consistent with Carnwath LJ's guidance to tribunals found at *Pegasus Birds* [38(1)] that "the tribunal should remember that its primary task is to find the correct amount of tax".

217. The FTT directed itself to the guidance given by Carnwath LJ in *Pegasus Birds* (see FTT [658]-[659]). However, in our view, it did not follow that guidance in its consideration of the assessment on SA.

218. Carnwath LJ's guidance in *Pegasus Birds* requires the tribunal to have regard to the "nature" of the breach in determining whether it is appropriate to set aside the entire assessment (*Pegasus Birds* [28]). The clear implication of Carnwath LJ's comments in *Pegasus Birds* [28]-[29] is that it will only be in the most egregious of cases – typically those involving dishonesty or corruption on the part of the case officer – that justice will require that an assessment should be set aside in its entirety. In cases where the officer concerned has "consciously or unconsciously, cut corners or closed their minds to relevant material", the correct approach will ordinarily be to adjust the amount of the assessment to a fair figure.

219. As we have mentioned above, the only relevant defect that the FTT identified as forming the basis of its decision to set aside the assessment was the deliberate decision of Mr Foster not to take the York Wines bank statements into account. As we have commented above, the FTT concluded that Mr Foster's evidence in relation to the assessments was "clearly misleading". However, despite its significant criticisms of Mr Foster's evidence, the FTT did not find that he was dishonest or corrupt. Whilst it may be said that Mr Foster cut corners or closed his mind to the relevance of the evidence in the York Wines bank statements, in our view, the defect identified by the FTT was not of such a nature that would typically require an entire assessment to be set aside in the interests of justice.

220. Carnwath LJ's guidance in *Pegasus Birds* also requires the tribunal to have regard to the consequences of the breach to determine whether justice can be done by adjusting the amount of the assessment (*Pegasus Birds* [29]).

221. The effect of Mr Foster's decision not to take the York Wines bank statements into account was, according to Mr Hayhurst, beneficial to the respondents. He said this because of the way in which Mr Foster calculated the cash/bank ratio which formed the basis of his assessment. In summary, Mr Foster compared figures for sales by York Wines to SA in SA's bank statements, which had been obtained through an exchange of information request, with figures in the SAGE accounting records of York Wines, which had been obtained as part of the investigation into Operation Rust (FTT [526]-[531]). He assumed that the difference in those figures represented alcohol that was acquired by SA and sold by SA for cash (i.e. the mirror loads). For the periods for which York Wines was trading and information was available (2004-2007), Mr Foster then produced a ratio (the cash/bank ratio) of alcohol acquired for cash sales (mirror loads) to alcohol acquired for sales which went through the bank statements. He applied that cash/bank ratio to the figures in the bank statements for years in which SA was not purchasing alcohol from York Wines to produce estimated figures for the value of alcohol that was acquired for cash sales in those years. An assumed profit margin, derived from other

information available to HMRC, was then added to the estimated values of alcohol acquired for cash sales to produce an estimated value of the mirror loads in relevant years.

222. There were some significant assumptions in Mr Foster's calculations. We do not need to revisit them in detail here. However, one assumption that he made was that all the debits in SA's bank statements in the years used to determine the cash/bank ratio related to purchases of alcohol from York Wines. He made this assumption because the SA bank statements were not sufficiently detailed to identify the payees. Mr Hayhurst says the York Wine statements would have shown that not all the payments in the SA bank statements were made to York Wines and that some were made to other suppliers of alcohol. The effect would have been to increase the cash/bank ratio and so the amount of the assessment.

223. Mr Webster KC and Mr Gurney took issue with Mr Hayhurst's analysis. As we have set out above, they questioned the fundamentals of Mr Foster's methodology. Far from demonstrating that, even if the information in the York Wines bank statements had been taken into account the result would have been detrimental to the respondents, Mr Webster KC and Mr Gurney submitted that it would have produced results which showed that the methodology was simply not credible. They also questioned some of the assumptions that Mr Foster had made – principally his assumption that the debits shown in SA's bank statements were all (or mostly all) for the purchase of alcohol.

224. We have considered all these submissions. Our impression from the evidence that we have heard is that the defect identified by the FTT was of a kind that was capable of being addressed by adjusting the amount of the assessment to what the FTT considered on the evidence before it to be the correct figure and, given the FTT's conclusions on the nature of the breach, this was a case in which justice could be done in that manner. We do not, however, express a firm conclusion on that issue. We have not heard all the evidence that was before the FTT. However, it appears to us that, in reaching its decision to set aside the assessment, the FTT did not follow the guidance in Pegasus Birds. Having identified Mr Foster's failure to take into account the York Wines bank statements as the relevant deficiency (FTT [663]) and commented on the serious nature of that breach (FTT [664]), the FTT leapt to its conclusion that it would have been necessary to set aside the assessment (FTT [664]). The FTT did not first consider whether justice could be done by correcting the amount of the assessment to what the FTT considered to be a fair figure. Even if there was a breach of the best judgment requirement, it was required to do so according to the guidance set out by Carnwath LJ at *Pegasus Birds* [23] and [28]-[29].

225. Furthermore, it was important for the FTT to make that assessment in order to fulfil its primary task, that of finding the correct amount of tax (*Pegasus Birds* [38(1)]). This consideration was important because, if Mr Hayhurst was correct in his submissions, the decision of Mr Foster not to take the York Wines bank statements into account had the effect that the assessment was lower than it should have been. Equally, if Mr Webster and Mr Gurney were correct in submitting that there were more fundamental problems with the quantum of the assessment, whether by reason of the problem with the debits or otherwise, there was plainly a need to consider how those problems interacted with the failure to take the York Wines bank statements into account and how that interaction affected the quantum of the assessment.

226. In summary therefore, if the FTT were to set aside the assessment, the case needed to fall into the category of "rare" cases identified by Carnwath LJ in *Pegasus Birds*. But in doing so, the FTT needed to ask itself whether the defect it had identified – the deliberate decision not to take the York Wines statements into account – was so serious or fundamental that justice

required the whole of the assessment to be set aside, or whether justice could be done simply by correcting the amount of what the FTT found to be a fair figure on the evidence (*Pegasus Birds* [29]). The FTT did not carry out the exercise of considering what a fair figure on the evidence was or might be, and so the FTT was not in a position to answer that question. The overall effect was that the FTT appear to have been guilty of an over-rigid application of the two-stage approach, the dangers of which are highlighted by Carnwath LJ in *Rahman No. 1*, as quoted in *Pegasus Birds* [18]-[19], which we have set out above.

227. In our view, the FTT failed to follow the guidance set out by Carnwath LJ in *Pegasus Birds* (in particular, at *Pegasus Birds* [29] and [38]). That was an error of law. The FTT did not ask itself the required question. It follows that we also allow the appeal on Ground 5.

Conclusion

228. We have allowed the appeal on both Ground 4 and Ground 5. In doing so, we have identified errors of law in the FTT Decision. We are therefore required by section 12(1) TCEA 2007 to consider whether to set aside the FTT Decision.

> (1) As regards Ground 4, we do not regard the error as immaterial. The FTT's failure to apply the correct test limited the focus of the FTT's enquiry into HMRC's assessment. It informed the FTT's decision that the entire SA assessment should be set aside, which was the basis of Ground 5.
>
> (2) As regards Ground 5, once again, this is not a case where the error of law identified above can be said to have been immaterial. To the contrary, there is good reason to think that, if the FTT had asked themselves the right question, they may well have come to the conclusion that justice could be done by correcting the amount of the assessment to what the FTT found to be a fair figure (see the comment at FTT [667]).

As we have mentioned above, Grounds 4 and 5 relate to the appeal against the DLN. Accordingly, we will set aside the FTT Decision in so far as it relates to the DLN.

229. This leaves the question of whether we should remit the case to the FTT or re-make the decision. We are in no position to consider the validity or quantum of the assessment ourselves, or to answer the questions that the FTT failed to answer. The submissions in this appeal have done no more than scratch the surface of the process undertaken by HMRC to make the SA assessment and the calculations underlying it. However undesirable this may be in terms of expense and finality, we have no option, but to remit the issues concerning the validity and quantum of the assessment on SA to the FTT. Following the issue of this decision, we will make directions to take representations from the parties as to the terms on which that remission should be made.

GROUND 6: INADEQUATE REASONS

230. Ground 6 is that the FTT failed to give any or adequate reasons with respect to several key matters set out in the application.

Background

231. By this ground, HMRC say that the FTT did not give adequate reasons for some of its decisions. The matters to which HMRC refer relate to Grounds 3, 4 and 5. We have set them out below.

In relation to Ground 3:

(1) Why the FTT rejected HMRC's case and the evidence that Adrena was only used for the purpose of Global's cover loads and failed to distinguish between the mirror and cover loads? (FTT [524], [638]).

(2) Why, when the key question the Tribunal needed to ask itself was whether Global sold the alcohol in the EU or smuggled it into the UK and sold it thereafter (FTT [638]) did it not answer the question, but instead concluded that Adrena was responsible for the smuggling because it was named on the cover paperwork (and thus came forward to challenge a seizure)? (FTT [643])

(3) Why, when the respondents had accepted Global supplied the alcohol that was ultimately slaughtered in the UK (FTT [638]), the FTT concluded Adrena supplied the alcohol notwithstanding the overwhelming banking evidence that it had not purchased that alcohol from Global (save for the amount regarding the cover loads)? (FTT [326])

(4) Why the FTT concluded Adrena supplied the alcohol notwithstanding the transport analysis indicating goods were dispatched across the border from Global's warehouse (not Adrena's)?

(5) Why the FTT concluded Adrena supplied the alcohol in the UK notwithstanding the respondents' own witness, Mr Van de Vondel (the director of Adrena) did not give evidence to this effect?

(6) Why (if Ground 2 is successful) it concluded Adrena supplied the alcohol notwithstanding there was no evidence from Mr Malde that Global sold the alcohol subject to the mirror loads to Adrena?

(7) Why the Tribunal concluded that Adrena was the importer merely because that was the company used on the cover paperwork as the consignor (and thus stepped forward in event of a seizure) when it rejected the Respondents' alternative cases that Corkteck was the importer of the diverted alcohol because it was named on the cover paperwork as the consignee? (FTT [617]-[637])

(8) Why Adrena having its own corporate identity has any bearing on a) who owned and smuggled the mirror loads and b) how or why it contradicts the evidence that it was Global (not Adrena) who owned them? (FTT [642]-[643])

In relation to Ground 4:

(9) Why it rejected the thrust of HMRC's case made in Mr Foster's first witness statement and repeated by HMRC in closing, to the effect that there is no breach of best judgment principles in circumstances where an officer deliberately closed his mind to needing to consider certain information (i.e. the York Wine bank statements) because that information, albeit relevant, could only be adverse to the respondents and/or could in no way have causatively lowered the quantum of the assessment i.e. the officer decided to give the taxpayer the benefit of the doubt? (FTT [527])

In relation to Ground 5:

(10)Why, if there was a breach of the best judgement requirement, it rejected the Court of Appeal's guidance in *Pegasus Birds* at [23-29] not to automatically set aside the whole assessment but instead to try and seek to find a fair assessment figure on the evidence before it? If, for example, the FTT considered the assessment was not in accordance with best judgment principles because Mr Foster accepted in evidence he should not have taken into account 11 non-commercial debits, why it did not reduce the £11,162,180 DLN by the value of those debits, namely £290,525.27?

(11)If the Tribunal considered Mr Foster's failure to consider the York Wine bank statements was so "serious or fundamental" that it required the whole assessment to be set aside (*Pegasus Birds* [29]), what was the reason and logic behind this thinking given that (a) this was a case of Mr Foster closing his mind as opposed to fraud or corruption (*Pegasus Birds* [28]) and (b) taking the York Wines bank statements into account would only have dramatically increased the assessment and thus the failure to consider them was only to the respondents' advantage?

(12)Why it rejected HMRC's 'swings and roundabouts' point made in closing submissions – i.e. that any consideration of whether an assessment was made in HMRC's best judgment has to take into account both factors that are in the taxpayer's favour, and those which are adverse to the taxpayer?

The parties' submissions in outline

232. Mr Hayhurst, for HMRC, says that the FTT failed to give adequate reasons for each of the matters that we have set out above. Even if it was not necessary for the FTT to address all the arguments that had been raised before it, the FTT had to explain why it reached its decisions (*Fleming v Halifax Estate Agencies Ltd (trading as Colleys Professional Services)* [2000] 1 WLR 377 at pp381-382). The FTT had given a lengthy decision (130 pages) but there was "hardly anything by way of reasoning". The section addressing the "issues" (FTT [588]-[667]) was only 14 pages, most of which comprised summaries of the parties' submissions rather than findings or detailed reasons. The FTT's actual reasoning was limited to a few paragraphs.

233. Mr Webster KC and Mr Gurney, for the respondents, relied on their written submission in support of the FTT's approach referring to *Fleming*, *English v Emery Reimbold & Strick Ltd*. [2002] EWCA Civ 605 ("*English*") and *Aria Technology v HMRC* [2018] UKUT 363 (TCC) ("*Aria*"). As regards the specific matters in relation to Grounds 3, 4, and 5, they say the reasons for the FTT deciding the appeals in the respondents' favour on all of these issues were very clear from the FTT Decision.

Discussion

Relevant case law principles

234. We have been referred by the parties to various case law authorities. It will suffice for us to refer to comments of the Court of Appeal in *Fleming* at p381:

> We make the following general comments on the duty to give reasons.
>
> (1) The duty is a function of due process, and therefore of justice. Its rationale has two principal aspects. The first is that fairness surely requires that the parties especially the losing party should be left in no doubt why they have won or lost. This is especially so since without reasons the losing party will not know (as was said in *Ex parte Dave*) whether the court has misdirected

> itself, and thus whether he may have an available appeal on the substance of the case. The second is that a requirement to give reasons concentrates the mind; if it is fulfilled, the resulting decision is much more likely to be soundly based on the evidence than if it is not.
>
> (2) The first of these aspects implies that want of reasons may be a good self-standing ground of appeal. Where because no reasons are given it is impossible to tell whether the judge has gone wrong on the law or the facts, the losing party would be altogether deprived of his chance of an appeal unless the court entertains an appeal based on the lack of reasons itself.
>
> (3) The extent of the duty, or rather the reach of what is required to fulfil it, depends on the subject matter. Where there is a straightforward factual dispute, whose resolution depends simply on which witness is telling the truth about events which he claims to recall, it is likely to be enough for the judge (having, no doubt, summarised the evidence) to indicate simply that he believes X rather than Y; indeed there may be nothing else to say. But where the dispute involves something in the nature of an intellectual exchange, with reasons and analysis advanced on either side, the judge must enter into the issues canvassed before him and explain why he prefers one case over the other. This is likely to apply particularly in litigation where as here there is disputed expert evidence; but it is not necessarily limited to such cases.
>
> (4) This is not to suggest that there is one rule for cases concerning the witnesses' truthfulness or recall of events, and another for cases where the issue depends on reasoning or analysis (with experts or otherwise). The rule is the same: the judge must explain why he has reached his decision. The question is always, what is required of the judge to do so; and that will differ from case to case. Transparency should be the watchword.

235. In summary, the duty to give reasons arises because fairness requires the parties to be left in no doubt as to why they have won or lost. The duty is important in ensuring that judgments are soundly based and to secure the basis for any appeal. Lack of adequate reasons is therefore a good self-standing ground of appeal. The extent of the duty depends on the subject matter, but in cases involving technical issues with reasons advanced on each side, the FTT must enter into the issues canvassed before it, and explain why it prefers one case over the other.

236. It is clear from the other cases to which we have been referred, principally *English* and *Aria*, that the duty must not be set too high (*Aria* [35]). In particular, there is no duty on the FTT to deal with every argument presented by counsel. It is sufficient if the FTT's decision shows the parties the basis on which the FTT reached its decision. However, the issues the resolution of which were vital to the FTT's conclusion should be identified and the manner in which it resolved them explained. If the reasons that the tribunal reached its decision are apparent from a review of the judgment, in the context of the material evidence and submissions, any challenge on the basis of inadequacy of reasons before an appellate court or tribunal should be dismissed (*English* [17]-[19], [26]).

Application to the facts of this case

237. The issues raised by HMRC in this case relate to Grounds 3, 4 and 5.

238. There was no failure by the FTT to give adequate reasons in relation to the issues surrounding Ground 3. It is clear that HMRC failed in their case on the place of supply issue in relation to Global because the FTT decided, in our view correctly, that HMRC had the burden of proof and that HMRC had failed to prove their case.

239. As regards Ground 4, the reasons for the FTT's conclusion as to the exercise of best judgment are clear. It identified a defect in the assessment, and it found that that defect – a failure to take into account the evidence from the York Wines bank statements – was sufficiently serious as to amount to a failure to exercise best judgment. HMRC may dispute that reasoning and that conclusion, but it does not amount to a failure to give adequate reasons.

240. As regards Ground 5, we have found that the FTT erred in law in that they failed to address correctly the exercise of considering a best judgment challenge to the assessment. The failure was not a failure to give adequate reasons. The FTT's reasoning was clear. As we have explained, the issue was that the FTT failed to ask itself the right question. The result was that it did not produce an answer to that question, as opposed to producing an answer which was not properly reasoned.

Conclusion

241. For the reasons that we have given, we dismiss the sixth ground of appeal.

WHETHER THE PLN FOR THE EXCISE DUTY PENALTY WAS ISSUED IN TIME

242. The final issue on which we heard submissions from the parties was whether the PLN issued to Mr Malde in relation to the excise duty penalty was issued in time. This was an issue that the FTT did not need to decide because of its conclusions on the other issues. The FTT chose not to express a view on this issue.

243. We have dismissed the appeals on Grounds 1, 3 and 6. The successful appeal against this PLN therefore remains undisturbed by our decision. This question is a pure question of law. We do not need to decide this question in order to deal with the appeal against this PLN. We do not do so.

DISPOSITION

244. For the reasons that we have given above:

(1) we dismiss the appeals on Grounds 1, 3 and 6;

(2) we allow the appeal on Ground 2;

(3) we allow the appeal on Ground 4;

(4) we allow the appeal on Ground 5;

(5) having dismissed the appeals on Grounds 1, 3, and 6, we do not need to decide the issue relating to whether the PLN issued to Mr Malde in relation to the excise duty penalty was issued in time and do not do so.

245. We find that the error of law identified in Ground 2 was not material to the appeals in relation to Global and the PLNs that relate to them. We will not set aside the FTT Decision in relation to them.

246. Having allowed the appeals on Grounds 4 and 5, we set aside the FTT Decision insofar as it relates to the appeal against the DLN. We remit the issues concerning the validity and quantum of the assessment on SA that underlies the DLN to the FTT.

247. Following the issue of this decision, we will invite further submissions from the parties on the terms on which these matters should be remitted to the FTT. Following receipt of those submissions, we will determine the terms of remission, either on paper or, if we decide that this is necessary, by way of a further hearing.

MR JUSTICE EDWIN JOHNSON

JUDGE ASHLEY GREENBANK

UPPER TRIBUNAL JUDGES

Release date: 07 November 2024