



Neutral Citation: [2026] UKUT 00116 (TCC)

Case Number: UT/2024/000095

**UPPER TRIBUNAL  
(Tax and Chancery Chamber)**

Rolls Building, London EC4A 1NL

*Discovery assessments – extended time limit assessments – penalty for inaccuracy in a return – deliberate inaccuracy – whether deliberate inaccuracy necessarily involves dishonesty – whether HMRC required to specifically plead and prove dishonesty – whether the FTT erred in failing to explain how the appellant’s conduct might not involve dishonesty*

**Heard on: 10 December 2025  
Judgment date: 12 March 2026**

**Before**

**THE HONOURABLE MR JUSTICE NICHOLAS THOMPSELL  
JUDGE JONATHAN CANNAN**

**Between**

**NEW CLAIRE WINE LIMITED**

**Appellant**

**and**

**THE COMMISSIONERS FOR HIS MAJESTY’S  
REVENUE AND CUSTOMS**

**Respondents**

**Representation:**

For the Appellant: David Bedenham KC and Max Schofield of counsel instructed by CTM Tax Litigation Limited

For the Respondents: Michael Ripley of counsel instructed by the General Counsel and Solicitor for His Majesty’s Revenue and Customs

## DECISION

### INTRODUCTION

1. This is an appeal against a decision of the First-tier Tribunal (Tax Chamber) (“the FTT”) released on 4 January 2024 (“the Decision”). The FTT dismissed the appellant’s appeals against assessments to corporation tax and VAT and against a penalty for deliberate inaccuracies in its VAT returns.

2. The assessments to corporation tax were “discovery assessments” pursuant to paragraph 41 Schedule 18 Finance Act 1998 (“FA 1998”). One of the circumstances in which a discovery assessment may be made is where a loss of tax for an accounting period has been brought about “carelessly or deliberately”. There are time limits for making discovery assessments. An extended time limit of 20 years from the end of the accounting period applies where the loss of tax was brought about deliberately.

3. The VAT assessments were made pursuant to section 73 Value Added Tax Act 1994 (“VATA 1994”). An extended time limit of 20 years from the end of the prescribed accounting period applies where a loss of VAT was brought about deliberately.

4. The penalty was notified pursuant to Schedule 24 Finance Act 2007 (“FA 2007”). A penalty is payable where a corporation tax return or a VAT return contains a careless or deliberate inaccuracy leading to an understatement of tax. The level of penalty is higher in the case of deliberate inaccuracies.

5. The FTT found that the appellant had understated its sales in its corporation tax and VAT returns for the relevant accounting periods. There is no challenge to that finding on this appeal. The FTT went on to find that the appellant’s conduct in understating its sales was deliberate. The effect of that finding was that the corporation tax and VAT assessments were in time and the respondents (“HMRC”) were entitled to impose a higher level of penalty.

6. The FTT also found in the alternative that the appellant’s conduct in understating its sales was careless. The effect of that finding would be that only some of the assessments were in time and the penalty would have been calculated at a lower level.

7. The appellant contends that the FTT was not entitled to find that its conduct was deliberate. In summary, that is because a finding of deliberate conduct constitutes a finding of dishonesty. It is said that the FTT wrongly proceeded on the basis that no allegation of dishonesty had been made against the appellant which meant that procedural safeguards in relation to findings of dishonesty had not been satisfied. In particular, dishonesty was not specifically pleaded or particularised by HMRC and was not put to the appellant’s witness.

8. In summary, HMRC say that they pleaded and particularised allegations of deliberate understatement of sales by the appellant and that this allegation was put to the appellant’s witness. In those circumstances the FTT was entitled to find that the appellant’s conduct in understating its sales was deliberate. There was no procedural unfairness.

9. It is necessary for us to consider the meaning of the word “deliberate” in the various statutory contexts in which it arises in this appeal, including the relationship between deliberate and dishonest conduct. We shall summarise the FTT’s findings in relation to the appellant’s conduct and the basis on which it found that the understatement of sales was deliberate. We then consider the appellant’s challenge to the FTT’s finding that the appellant’s conduct was deliberate.

10. We are grateful to all counsel for the careful and efficient way in which they presented their submissions.

## STATUTORY CONTEXTS

11. We set out in this section the relevant provisions in force at the time of the various assessments and the penalty notice.

### Corporation tax discovery assessments

12. A discovery assessment is an assessment made after a corporation tax return has been filed and after the time for HMRC to open an enquiry into that return has expired. Discovery assessments for corporation tax are made pursuant to paragraph 41 Schedule 18 FA 1998 where an officer of HMRC discovers that an amount of tax has not been assessed such that there has been a loss of tax. Paragraph 42 provides that HMRC may only make a discovery assessment if the circumstances in paragraphs 43 or 44 are met. We are concerned with paragraph 43 which requires that the loss of tax “*was brought about carelessly or deliberately*”.

13. Paragraph 46 sets out the time limits for discovery assessments. The normal time limit is 4 years from the end of the accounting period to which the assessment relates. For a loss of tax brought about carelessly, the time limit is extended to 6 years. For a loss of tax brought about deliberately by the company or a related person, the time limit is extended to 20 years:

46(1) Subject to any provision of the Taxes Acts allowing a longer period in any particular class of case no assessment may be made more than 4 years after the end of the accounting period to which it relates.

(2) An assessment in a case involving a loss of tax brought about carelessly by the company (or a related person) may be made at any time not more than 6 years after the end of the accounting period to which it relates (subject to sub-paragraph (2A) and to any other provision of the Taxes Acts allowing a longer period).

(2A) An assessment in a case involving a loss of tax —

(a) brought about deliberately by the company (or a related person),

...

may be made at any time not more than 20 years after the end of the accounting period to which it relates (subject to any provision of the Taxes Acts allowing a longer period).

14. As originally enacted and until 1 April 2010, the relevant condition for a discovery assessment and the extended time limit provisions used concepts of “fraud” and “negligence”.

### VAT assessments

15. VAT assessments are made pursuant to section 73 VATA 1994 where a person has failed to make a return or where it appears to HMRC that a return is incomplete or incorrect. Assessments must be made to best judgment.

16. Section 77 VATA 1994 sets out the time limits for making assessments. Section 77(1) provides that the normal time limit is not more than 4 years after the end of the prescribed accounting period. However, section 77(4) provides that in cases falling within section 77(4A), the time limit is extended to 20 years. Those cases include where a loss of VAT is brought about deliberately. That is defined by section 77(4B) as including “*a loss that arises as a result of a deliberate inaccuracy in a document given to [HMRC]*”:

77(1) Subject to the following provisions of this section, an assessment under section 73, 75 or 76, shall not be made —

(a) more than 4 years after the end of the prescribed accounting period ...

...

(4) In any case falling within subsection (4A), an assessment of a person (“P”), or of an amount payable by P, may be made at any time not more than 20 years after the end of the prescribed accounting period or the importation, acquisition or event giving rise to the penalty, as appropriate (subject to subsection (5)).

(4A) Those cases are —

(a) a case involving a loss of VAT brought about deliberately by P (or by another person acting on P's behalf) ...

(4B) In subsection (4A) the references to a loss of tax brought about deliberately by P or another person include a loss that arises as a result of a deliberate inaccuracy in a document given to His Majesty's Revenue and Customs by that person.

17. As originally enacted and until 1 April 2009, section 77 provided for an extended time limit of 20 years in cases where VAT was lost as a result of conduct falling within section 60(1) or for which a person had been convicted of fraud. Conduct falling within section 60(1) was conduct involving dishonesty for the purpose of evading VAT.

### **VAT penalties**

18. Paragraph 1 Schedule 24 FA 2007 provides that a penalty is payable by a person who gives HMRC a specified document, including a VAT return, and that document contains an inaccuracy which leads to an understatement of tax. The inaccuracy must be careless or deliberate:

1(1) A penalty is payable by a person (P) where —

- (a) P gives HMRC a document of a kind listed in the Table below, and
- (b) Conditions 1 and 2 are satisfied.

(2) Condition 1 is that the document contains an inaccuracy which amounts to, or leads to —

- (a) an understatement of liability to tax,
- (b) a false or inflated statement of a loss, or
- (c) a false or inflated claim to repayment of tax.

(3) Condition 2 is that the inaccuracy was careless (within the meaning of paragraph 3) or deliberate on P's part.

19. Paragraph 3 Schedule 24 FA 2007 provides that a careless inaccuracy is where the inaccuracy is due to a failure to take reasonable care. It also distinguishes for culpability purposes a careless inaccuracy, a deliberate but not concealed inaccuracy and a deliberate and concealed inaccuracy:

3(1) For the purposes of a penalty under paragraph 1, inaccuracy in a document given by P to HMRC is —

- (a) “careless” if the inaccuracy is due to failure by P to take reasonable care,
- (b) “deliberate but not concealed” if the inaccuracy is deliberate on P's part but P does not make arrangements to conceal it, and
- (c) “deliberate and concealed” if the inaccuracy is deliberate on P's part and P makes arrangements to conceal it (for example, by submitting false evidence in support of an inaccurate figure).

20. The level of culpability affects the level of penalty. Paragraph 4 Schedule 24 FA 2007 sets out the standard amounts of penalty for the behaviours that are subject to the Schedule 24

regime. In the circumstances of this appeal the penalty payable, subject to any reduction for disclosure, would be 30% of the potential lost revenue for a careless inaccuracy, 70% for a deliberate but not concealed inaccuracy and 100% for a deliberate and concealed inaccuracy.

21. Paragraph 19 provides that where a penalty is payable for a deliberate inaccuracy which was attributable to an officer of a company, the officer is liable to pay such portion of the penalty as HMRC may specify in a written notice. Such notices are called personal liability notices.

#### **THE FTT'S FINDINGS**

22. The following decisions of HMRC were under appeal in the FTT:

(1) Discovery assessments to corporation tax issued on 22 October 2019 for the accounting period ending 31 March 2013 and subsequent accounting periods. These assessments related to undeclared profits and also charges pursuant to section 455 Corporation Tax Act 2010 ("CTA 2010") on loans to directors.

(2) VAT assessments issued on 20 November 2018 for VAT accounting period 06/12 and subsequent accounting periods.

(3) A penalty notice issued on 6 November 2019 for deliberate but not concealed inaccuracies in the appellant's VAT returns. A penalty notice in relation to the corporation tax returns was also issued but was not under appeal to the FTT.

23. We summarise the relevant findings of the FTT with appropriate references to the Decision in the following paragraphs.

24. The appellant had failed to comply with its statutory obligations in relation to record-keeping for corporation tax and VAT. It failed to ensure that all income and associated expenses were brought into account. A "stock flow exercise" established that there were major omissions in the records and returns (see [210], [211] and [311]).

25. Mr Bhattachan, one of the appellant's two shareholders and directors, did not give evidence. HMRC's concern that his personal bank statements showed no withdrawals and no day-to-day household expenditure other than utilities, loan and mortgage repayments was therefore left unanswered (see [216]).

26. Mr Paudel was the other shareholder and director of the appellant and the sole witness on behalf of the appellant. The FTT found that he was not a credible witness for reasons given at [217] – [237].

27. The appellant had purchased wine for resale from a business involved in an excise duty diversion fraud (The Italian Wine Company, "TIWC"). The records of TIWC showed sales having been made to the appellant but the purchases were not in the appellant's records (see [247] – [254]).

28. The stock flow exercise prepared by HMRC identified significant volumes of off-record sales and purchases (see [255] – [264] and [312]).

29. The appellant diverted the proceeds of off-record sales to the two directors which amounted to advances for the purposes of section 455 CTA 2010 (see [296] – [305]).

30. In relation to the discovery assessments to corporation tax, the FTT held that inaccuracies in the appellant's returns were deliberate. In particular, the FTT held at [312] and [313]:

312. ...This is not simply a case of lamentably poor record keeping which in itself was entirely caused by the directors. What was the appellant's intention? Having made the choice to use the appellant as a trading vehicle, nevertheless the directors chose to operate using their own debit and/or credit cards, and bank accounts. The Barclays account was used both for the appellant and the Bottle Stop. They knew that those transactions were not in the accounts. They chose to buy and sell 9,700 cases of Villa Radosa off record. The stock flow exercise identifies significant volumes of off record sales and purchases.

313. [The directors] were responsible for the appellant's accounts and tax returns and, not least because of the sheer volume of anomalies in the records, they must have known that they were not accurate. In our view, to paraphrase the Supreme Court in *HMRC v Tooth* [2021] UKSC 17, at every stage there was an intention to mislead the Revenue with the consequence that there was insufficiency of tax. Looking at the totality of the evidence we find that the behaviour was deliberate.

31. The FTT therefore found that HMRC was in time to issue corporation tax discovery assessments going back to accounting period ending 31 March 2013 (see [321] and [322]). In the alternative, the appellant's conduct was careless and HMRC was in time to issue the discovery assessments for accounting period ending 31 March 2014 and subsequent accounting periods (see [314] – [320]). Certain issues in relation to the quantum of the corporation tax assessments were left for the parties to agree and in default of agreement the matter would return to the FTT. As such, the Decision was a decision in principle.

32. The FTT rejected a challenge to the VAT assessments and found that they were made to best judgment (see [333] – [340]). It also found that the VAT assessments were made in time (see [341]). The quantum of the VAT assessments was also left for agreement between the parties.

33. In relation to penalties, HMRC had calculated penalties on the basis of deliberate but not concealed behaviour by the appellant. The FTT adopted its previous finding in relation to the corporation tax discovery assessments and found that the appellant had deliberately understated sales in its VAT returns (see [353] and [360]). It confirmed the penalties, subject to issues of quantum.

#### **THE GROUND OF APPEAL**

34. There is a single ground of appeal against the Decision. Permission to appeal on grounds that the FTT's fact-finding was flawed or unreliable was refused by the Upper Tribunal. Permission was granted by the Upper Tribunal on the following ground:

The FTT erred in finding that the appellant had deliberately understated its tax liabilities in circumstances where (as the FTT acknowledged at paragraphs 238 and 241) HMRC had not alleged (and it was not open to the FTT to find) that the Appellant had behaved dishonestly.

35. If the appellant succeeds on that ground of appeal, then the corporation tax assessment for accounting period ending 31 March 2013 would have been out of time. The VAT assessment for period 09/14 and earlier periods would have been out of time. Later periods would have been in time because the FTT found careless behaviour in the alternative and there is no challenge to that finding. The maximum penalty for careless behaviour would have been at the rate of 30% of the understated VAT, subject to a reduction for disclosure.

36. The appellant's case in outline is that deliberate conduct in each of the statutory contexts described above equates to dishonest conduct. As such, the procedural safeguards associated with an allegation of dishonesty were applicable. HMRC was required to plead a case of dishonesty, particularise all facts and matters relied upon to establish dishonesty and put to Mr Paudel that he had dishonestly understated the appellants' liability to corporation tax and VAT

in the appellant's returns. HMRC had failed to do so, and therefore it was not open to the FTT to make any finding that there was a deliberate inaccuracy because it constituted or was tantamount to a finding of dishonesty.

37. The appellant argued before the FTT, where Mr Bedenham KC and Mr Scofield did not appear, that HMRC had failed to put any case on dishonesty to Mr Paudel. It was not suggested that HMRC had failed to plead their case fully. The FTT dealt with the argument at [238] – [241]. It acknowledged that HMRC had not put their case on the basis of dishonesty but found that there had been no need for it to do so:

*Whether HMRC alleged fraudulent or dishonest behaviour?*

238. We do not propose to address every argument that was advanced for the appellant in relation to the argument that HMRC had alleged fraudulent and dishonest behaviour. Mr Jones [leading counsel for the appellant] argued that it had not been put to Mr Paudel that he was fraudulent or dishonest and indeed it was not. However, we find that that was because, although HMRC certainly argued that the appellant's behaviour, through its directors, was deliberate and caused a loss of tax, they did not argue that it was either fraudulent or dishonest.

239. Mr Jones argued that HMRC had "rowed back" on the issue of fraudulent or dishonest behaviour but there was an "undercurrent" to that effect in the assessments and HMRC's case. The only inference to that effect that we found was at paragraph 73 of the VAT Statement of Case where HMRC had said that the behaviour was "at least deliberate". That was not repeated and Mrs McIntyre did not advance that argument at any stage.

240. In any event, in our view, that had not been Officer Dyson's approach. He made it very clear that he had relied on what had been said at the meeting on 16 May 2017 and had given VKM [the appellant's accountant] and others numerous opportunities to comment thereon and they simply had not responded in any satisfactory fashion. Officer Maqsood had adopted the same approach.

241. In summary, deliberate behaviour is not necessarily either fraudulent or dishonest and we do not accept that HMRC have argued fraudulent or dishonest behaviour.

38. The appellant says that the FTT erred in these paragraphs. It ought to have found that deliberate behaviour necessarily involves dishonesty in this context. Alternatively, if dishonesty is not a necessary element of deliberate behaviour then the FTT erred in failing to explain how the appellant's conduct on the facts found might not have been dishonest. We deal with these alternative submissions under the following headings:

- (1) Procedural safeguards where there is an allegation of dishonesty.
- (2) Does deliberate conduct necessarily involve dishonesty in this context?
- (3) Was HMRC required to plead and prove dishonesty?
- (4) Did the FTT err in failing to explain how the appellant's conduct might not involve dishonesty?

#### **(1) Procedural safeguards where there is an allegation of dishonesty**

39. The test for dishonesty is that set out in *Ivey v Genting Casinos (UK) Ltd* [2017] UKSC 67 at [74]:

74. ... When dishonesty is in question the fact-finding tribunal must first ascertain (subjectively) the actual state of the individual's knowledge or belief as to the facts. The reasonableness or otherwise of his belief is a matter of evidence (often in practice determinative) going to whether he held the belief, but it is not an additional requirement that his belief must be reasonable; the question is whether it is genuinely held. When once his actual state of mind as to knowledge or

belief as to facts is established, the question whether his conduct was honest or dishonest is to be determined by the fact-finder by applying the (objective) standards of ordinary decent people. There is no requirement that the defendant must appreciate that what he has done is, by those standards, dishonest.

40. There are two limbs to dishonesty. First, establishing the individual's subjective state of mind and knowledge. Second, establishing whether the individual's conduct in light of that state of mind and knowledge was objectively honest or dishonest applying the standards of ordinary decent people.

41. The requirement for a party to put its case to another party's witnesses arises in relation to all allegations, but it is especially important where a witness is being accused of dishonesty. In *TUI UK Ltd v Griffiths* [2023] UKSC 48, the Supreme Court described at [70] the rule whereby a party is required to challenge in cross-examination the evidence of any witness if that party wishes to submit that the witness' evidence should not be accepted:

70. In conclusion, the status and application of the rule ... can be summarised in the following propositions:

(i) The general rule in civil cases, as stated in *Phipson*, 20th ed, para 12-12, is that a party is required to challenge by cross-examination the evidence of any witness of the opposing party on a material point which he or she wishes to submit to the court should not be accepted. That rule extends to both witnesses as to fact and expert witnesses.

(ii) In an adversarial system of justice, the purpose of the rule is to make sure that the trial is fair.

(iii) The rationale of the rule, ie preserving the fairness of the trial, includes fairness to the party who has adduced the evidence of the impugned witness.

(iv) Maintaining the fairness of the trial includes fairness to the witness whose evidence is being impugned, whether on the basis of dishonesty, inaccuracy or other inadequacy. An expert witness, in particular, may have a strong professional interest in maintaining his or her reputation from a challenge of inaccuracy or inadequacy as well as from a challenge to the expert's honesty.

(v) Maintaining such fairness also includes enabling the judge to make a proper assessment of all the evidence to achieve justice in the cause. The rule is directed to the integrity of the court process itself.

(vi) Cross-examination gives the witness the opportunity to explain or clarify his or her evidence. That opportunity is particularly important when the opposing party intends to accuse the witness of dishonesty, but there is no principled basis for confining the rule to cases of dishonesty.

(vii) The rule should not be applied rigidly. It is not an inflexible rule and there is bound to be some relaxation of the rule, as the current edition of *Phipson* recognises in para 12.12 in subparagraphs which follow those which I have quoted in para 42 above. Its application depends upon the circumstances of the case as the criterion is the overall fairness of the trial. Thus, where it would be disproportionate to cross-examine at length or where, as in *Chen v Ng*, the trial judge has set a limit on the time for cross-examination, those circumstances would be relevant considerations in the court's decision on the application of the rule...

42. In relation to pleading dishonesty, Lewison J (as he then was) reviewed a number of relevant authorities in *Mullarkey v Broad* [2007] EWHC 3400 (Ch) at [41] to [44]:

41. In *Belmont Finance Corporation Ltd. v. Williams Furniture Ltd.* [1979] Ch. 250, 268 Buckley L.J. said:

"An allegation of dishonesty must be pleaded clearly and with particularity. That is laid down by the rules and it is a well-recognised rule of practice. This does not import that the word 'fraud' or the word 'dishonesty' must be necessarily used. The facts alleged may sufficiently demonstrate that dishonesty is allegedly involved, but where the facts are complicated this may not be so clear, and in such a case it is incumbent upon the pleader to make it clear when dishonesty is alleged. If he uses language which is

equivocal, rendering it doubtful whether he is in fact relying on the alleged dishonesty of the transaction, this will be fatal; the allegation of its dishonest nature will not have been pleaded with sufficient clarity.”

42. In *Armitage v Nurse* Millett L.J. having cited this passage continued:

“In order to allege fraud it is not sufficient to sprinkle a pleading with words like "wilfully" and "recklessly" (but not "fraudulently" or "dishonestly"). This may still leave it in doubt whether the words are being used in a technical sense or merely to give colour by way of pejorative emphasis to the complaint.”

43. In *Paragon Finance plc v D B Thakerar & Co* he said on the question of pleading:

“It is well established that fraud must be distinctly alleged and as distinctly proved, and that if the facts pleaded are consistent with innocence it is not open to the court to find fraud. An allegation that the defendant 'knew or ought to have known' is not a clear and unequivocal allegation of actual knowledge and will not support a finding of fraud even if the court is satisfied that there was actual knowledge. An allegation that the defendant had actual knowledge of the existence of a fraud perpetrated by others and failed to disclose the fact to the victim is consistent with an inadvertent failure to make disclosure and is not a charge of fraud. It will not support a finding of fraud *even if the court is satisfied that the failure to disclose was deliberate and dishonest*. Where it is expressly alleged that such failure was negligent and in breach of a contractual obligation of disclosure, but not that it was deliberate and dishonest, there is no room for treating it as an allegation of fraud.” (Emphasis added)

44. In a case where the complaints relate to things that happened for the most part over fifteen years ago, it is, I think, all the more important that the allegations of dishonesty be clearly and distinctly pleaded.

43. Mr Bedenham rightly submitted that a finding of deliberate behaviour in the context of the relevant provisions is a serious matter. It permits discovery assessments and extended time limits for assessments; it significantly increases the level of penalties that HMRC can impose; it permits publication of a taxpayer’s name and details pursuant to section 94 Finance Act 2009; and it can lead to what is effectively a piercing of the corporate veil whereby a company officer can become personally liable for a penalty payable by a company pursuant to a personal liability notice. As such, we acknowledge that it was necessary for HMRC to clearly plead and prove the allegation of deliberate behaviour.

## **(2) Does deliberate conduct necessarily involve dishonesty in this context?**

44. The appellant contends that establishing deliberate conduct in the form of a deliberate inaccuracy in a tax return which understates the taxpayer’s liability to tax necessarily involves dishonesty and engages the safeguards referred to above. It is therefore necessary for HMRC to plead and fully particularise the facts and matters supporting a finding of dishonesty and to put to the taxpayer’s witness that they have been dishonest.

45. In support of the appellant’s case that deliberate conduct equates to dishonesty, Mr Bedenham relied upon well-established principles of statutory interpretation to the effect that we should ascertain the meaning of words used in the various statutes in light of their statutory context and the purpose of the provisions. We must also bear in mind the following principles described at 13.1, 13.5 and 13.8 of *Bennion, Bailey and Norbury on Statutory Interpretation 8<sup>th</sup> edition*:

(1) We should seek to avoid a construction which produces an absurd result. The more unreasonable a result, the less likely that Parliament intended it in the absence of express words or necessary implication (see Lord Millett in *R (ex parte Edison First Power Ltd) v Central Valuation Officer* [2003] UKHL 20 at [116] and [117]).

(2) Interference with established rights and principles recognised by the common law, including the principle of procedural fairness, should be expressed in clear terms (see

Lord Steyn in *R (ex parte Pierson) v Secretary of State for the Home Department* [1998] AC 539 at pp587 and 588).

(3) The law should be coherent and self-consistent (see Arden LJ in *R (oao Best) v Chief Land Registrar* [2015] EWCA 17 at [108]).

46. The appellant relies on the legislative history of the provisions for discovery assessments, extended time limits and penalties. Essentially, the previous language of “negligence” and “fraud” which we have already noted. The appellant also relies on various external aids to construction, principally pre-legislative consultation documents. Those consultation documents between 2006 and 2008 show that there was a desire to modernise the system of penalties and align the tax system in relation to direct and indirect taxes. It is appropriate to refer to a selection of those materials.

47. New terms for graduated behaviours were being considered in a consultation document from December 2006 entitled “*Modernising Powers, Deterrents and Safeguards*”. This was prior to the introduction of the new penalty regime in FA 2007. Some of the existing terminology, such as “negligence” was described as “*opaque*” although “fraud” was described as a “*relatively straightforward term*”. It was felt that there was insufficient differentiation “*across the spectrum of behaviour giving rise to understatements*”. What was proposed was “*clearer categories of behaviour ... to ensure transparency and consistency*” with “*effective and easily understood definitions*”, but noting that in the case of deliberate understatement with concealment “*the offence is not to be investigated with a view to criminal prosecution*”. Deliberate and concealed behaviour was described as “*outright calculated fraud*”.

48. We do not consider that responses to consultations are particularly helpful in this context unless there is a comment on the response from HMRC as the sponsoring department. One response to the consultation questioned why the term fraud had been abandoned. HMRC’s comment was that the distinction between deliberate understatement and deliberate understatement with concealment reflected a step change. It described both as “*forms of fraud*”.

49. A Report by HMRC to the House of Commons Public Accounts Committee, which post-dated Finance Act 2008, described the penalties which had been introduced. It described the penalty of up to 30% where people have not taken reasonable care, the penalty of up to 70% where people have “*deliberately evaded tax*” and the penalty of up to 100% where people have “*deliberately evaded tax and concealed their income*”. The appellant relies on the reference to evasion as indicating a requirement for dishonesty.

50. It is common ground that these materials are admissible as aids to interpretation in identifying the purpose of the statutory provisions, although they play a secondary role (see *R (oao O) v Secretary of State for the Home Department* [2022] UKSC 3, in particular Lord Hodge JSC at [29] – [31] and the minority opinion of Lady Arden JSC at [63] – [76]).

51. Mr Bedenham submitted that whilst the wording was changed, the concepts remained the same. There was no evidence of any intention to change the meaning, only to harmonise the approach across taxes and penalties and to use more accessible language. He submitted that it is clear from the pre-legislative material that deliberate inaccuracy was intended to equate to fraud and to convey dishonest conduct. Further, if Parliament intended to do away with or reduce the procedural safeguards associated with allegations of fraud and dishonesty, then it would have made that clear in the legislation.

52. Mr Ripley for HMRC did not object to us having regard to pre-legislative consultation documents but submitted that this material was silent as to deliberate behaviour being equivalent to fraud.

53. We are not satisfied from the consultation documents that Parliament was simply changing the language but effectively leaving the underlying concepts of negligence and fraud in place. It certainly used more straightforward language, but we cannot infer from this material that Parliament intended the new language to have anything other than its ordinary everyday meaning. If it was leaving the concept of fraud in place, it would have made specific and clear provision for a deliberate inaccuracy to involve dishonesty. Parliament was not in any way reducing procedural safeguards. An allegation of deliberate inaccuracy is on any view a serious allegation and it must be clearly pleaded and proved. It must also be put to relevant witnesses. We also consider that to some extent the concepts were changing. A new concept of “concealment” was introduced.

54. The new language in relation to corporation tax and VAT assessments was introduced by Schedule 39 Finance Act 2008. The Explanatory Note to the Finance Act 2008 indicates that one purpose of the new language was to align the descriptions of taxpayer behaviour used in setting time limits across different taxes with the language adopted for penalties in Schedule 24 Finance Act 2007. The Supreme Court noted this at [33] of *HM Revenue & Customs v Tooth* [2021] UKSC 17 where it was considering the meaning of “deliberate inaccuracy”:

33. ... There is some indication in the Explanatory Notes to the 2008 Act that the changes in language from negligence and fraud to carelessness and deliberate conduct were designed to align section 29 with the language of the penalty regime in Schedule 24 of the 2007 Act, or that the new terminology was at least borrowed from it.

55. One of the issues in *Tooth* was whether there was a deliberate inaccuracy in a tax return for the purposes of a discovery assessment on an individual pursuant to section 29 Taxes Management Act 1970 (“TMA 1970”). Section 118(7) TMA 1970 provides that references to a loss of tax brought about deliberately includes a loss of tax arising as a result of a deliberate inaccuracy in a document given to HMRC. These provisions are equivalent to the corporation tax discovery assessment provisions in this appeal. Section 117 FA 1998 provides that Schedule 18 shall be construed as if it was contained in TMA 1970. Hence, section 118(7) also has effect for corporation tax purposes. The same language is used in section 77(4B) VATA 1994 for VAT purposes.

56. In *Tooth*, the taxpayer had included an employment-related loss arising from a tax avoidance scheme in a box on his tax return reserved for partnership losses. This was because of a software glitch in the commercial software being used. The loss was therefore entered in the wrong box, but the taxpayer explained the position in the additional information box. The taxpayer genuinely believed at the time of making the return that he had self-assessed the right amount of tax. It only subsequently became apparent that the tax avoidance scheme was ineffective. The taxpayer had therefore understated his liability to tax and HMRC issued a discovery assessment relying on what they alleged was a deliberate inaccuracy in the return. The Supreme Court identified the relevant question for present purposes at [42] and answered that question at [43] – [47]. It is worth setting out these paragraphs in full to give context to the conclusion at [47]:

42. ... The question is whether [deliberate inaccuracy] means (i) a deliberate statement which is (in fact) inaccurate or (ii) a statement which, when made, was deliberately inaccurate. If (ii) is correct, it would need to be shown that the maker of the statement knew it to be inaccurate or (perhaps) that he was reckless rather than merely careless or mistaken as to its accuracy.

43. We have no hesitation in concluding that the second of those interpretations is to be preferred, for the following reasons. First, it is the natural meaning of the phrase “deliberate inaccuracy”. Deliberate is an adjective which attaches a requirement of intentionality to the whole of that which it describes, namely “inaccuracy”. An inaccuracy in a document is a statement which is

inaccurate. Thus the required intentionality is attached both to the making of the statement and to its being inaccurate.

44. Secondly, “deliberate inaccuracy” is the gateway to the taxpayer’s exposure to a 20-year period for the making of a discovery assessment, because of the importation of that phrase from section 118(7) into section 29(4). If the first interpretation were to be preferred the taxpayer could incur that exposure by making an honest but in fact inaccurate statement, even after taking reasonable care as to its truth or falsehood. The taxpayer would not even need to be careless, and yet would incur a much longer exposure than if he had been.

45. Thirdly, the penalty scheme in Schedule 24 to the Finance Act 2007 had, shortly before the relevant amendments were made to section 29 (including section 118(7)), used the same concept of deliberate inaccuracy for the purpose of triggering penalties more serious than those arising from carelessness, at altogether higher levels of blameworthy conduct (even though subdivided by reference to the presence or absence of concealment). It seems inconceivable that Parliament would have chosen the same language to serve as the gateway to the longest available period of exposure to a discovery assessment, if the phrase was to be interpreted as meaning only that the statement was intentionally made.

46. Fourthly, as already noted, the phrase was introduced at the same time as a substantial shortening of the exposure period for carelessness, which leads to the clear inference that Parliament must have regarded “deliberate inaccuracy” as conduct substantially more blameworthy. It is to be noted that, as Ms McCarthy submitted, there are other triggers for a 20-year time limit for an assessment which do not necessarily lie on a scale of blameworthiness between carelessness and fraud, but their existence does not displace the powerful inference as to Parliament’s intention already described.

47. It may be convenient to encapsulate this conclusion by stating that, for there to be a deliberate inaccuracy in a document within the meaning of section 118(7) there will have to be demonstrated an intention to mislead the Revenue on the part of the taxpayer as to the truth of the relevant statement or, perhaps, (although it need not be decided on this appeal) recklessness as to whether it would do so.

57. It is established therefore that deliberate conduct in this context involves at least intention to mislead HMRC. That is something that the FTT clearly had in mind at [313] of the Decision where it cited *Tooth* and found that at every stage there was an intention to mislead the Revenue with the consequence that there was insufficiency of tax.

58. Shortly before the judgment in *Tooth*, the Court of Appeal had held in *Canada Square Operations Ltd v Potter* [2021] EWCA Civ 339 that deliberate concealment for the purposes of section 32 Limitation Act 1980 could include reckless concealment. Whilst that was overturned by the Supreme Court in 2023, in 2021 the Supreme Court in *Tooth* left open the possibility at [47] that recklessness as to whether HMRC would be misled could amount to a deliberate inaccuracy. That itself is an indication that the Supreme Court did not consider that deliberate conduct necessarily involved dishonesty.

59. It is fair to say that *Tooth* was not specifically concerned with whether deliberate conduct necessarily involves dishonesty. However, there are other paragraphs in the decision which strongly indicate that not all deliberate behaviour is dishonest:

39. It may be, at least in theory, that section 118(7) does not cover the whole of the ground delineated by the “deliberate” limb of section 29(4). A taxpayer might bring about a relevant situation (here an insufficiency) by something said at a meeting with the Revenue. In such a case section 118(7) would have no application and the Revenue would have to show that the taxpayer intended by his statement to bring about the insufficiency, as section 29(4) would otherwise require.

40. It must be acknowledged that section 118(7) does therefore open the way to a discovery assessment with a 20-year time limit by reason of conduct by the taxpayer that falls well short of

a deliberate under-declaration of tax, so that it might be hard to describe such conduct as fraudulent, using the language of section 29(4) in force before 2010. But the language of section 118(7) is clear and unambiguous in having the effect described above. Suppose for example that Mr Tooth had entered the employment-related loss in the partnership box without providing any explanation of its true source and nature, intending the Revenue to believe that it derived from a partnership business and occurred during the 2007-8 tax year. It would still have generated a negative tax liability for 2007-8 in the amount which he genuinely believed to be true. But if that negative amount (and the consequent insufficiency) was the result of entering the loss in the partnership box, as a partnership loss, (rather than elsewhere in the return) then we consider that the deliberate limb of the first condition in section 29(4) would have been fulfilled. Such a presentation in his return would have misled the Revenue from having a full understanding of the information relevant to assessing his self-assessment.

60. The Supreme Court was acknowledging that a loss of tax might be brought about deliberately in circumstances that it might be hard to describe as fraudulent. It returned to the question at [83]:

83. ... The taxpayer also has the protection of the statutory time limits, which as we have explained are linked to different levels of culpability on their part. It is typically only in relation to what amounts to fraud or is akin to fraud that the time limit becomes as long as 20 years...

61. It is notable that the Supreme Court considered that the extended time limit of 20 years applied “typically” but not exclusively in relation to fraud or circumstances akin to fraud.

62. The second limb of the test for dishonesty in *Ivey v Genting Casinos* is certainly not part of the test described in *Tooth*. The Supreme Court considered that the only requirement was an intention to mislead HMRC as to the truth of a statement in the return. It is clear to us that in these passages the Supreme Court was not equating a deliberate inaccuracy with fraud. If dishonesty was an essential ingredient of a deliberate inaccuracy, then we consider that the Supreme Court would have identified it as such in *Tooth*. The absence of any suggestion of dishonesty on the part of Mr Tooth would have been another straightforward answer to HMRC’s case that there was a deliberate inaccuracy in his return.

63. We were referred to the decision of this Tribunal in *CF Booth Limited v HM Revenue & Customs* [2022] UKUT 217 (TCC) (Bacon J and Judge Brannan). The decision in *CF Booth* was released very shortly before the FTT’s Decision in this case and is not referred to by the FTT. In 2017, the FTT had dismissed the taxpayer’s “MTIC appeal”. It held that the test in *Axel Kittel v Belgium; Belgium v Recolta Recycling Joined Cases C-439/04* was satisfied and that the taxpayer knew or should have known that its transactions were connected with fraud, that it was not entitled to zero rate certain export transactions for VAT purposes and that it was not entitled to input tax credit on other transactions. There was no appeal against that decision. HMRC subsequently issued a penalty to the taxpayer on the basis that its VAT returns contained deliberate inaccuracies. The taxpayer appealed against that decision on the ground, amongst others, that there was no deliberate inaccuracy in the VAT returns. HMRC applied to strike out the taxpayer’s appeal against the penalty on the grounds that it was seeking to re-litigate matters and was an abuse of process, alternatively it had no reasonable prospect of success.

64. The FTT struck out the grounds of appeal, save for a challenge to the quantum of the penalty and the quality of the taxpayer’s disclosure. On appeal to the Upper Tribunal, the taxpayer contended that the conclusions of the FTT on knowledge of the connection with fraud in 2017 did not determine the question of deliberate conduct or the element of dishonesty which was inherent in that deliberate conduct. The taxpayer submitted that HMRC’s allegation of deliberate inaccuracy inevitably involved some element of dishonesty which did not follow from the FTT’s findings in 2017. The Upper Tribunal rejected that submission. The FTT had

relied on another FTT decision in *Auxilium Project Management Ltd v HM Revenue & Customs* [2016] UKFTT 249 (TC) from which the Upper Tribunal quoted the following passage with approval:

63. ... a deliberate inaccuracy occurs when a taxpayer knowingly provides HMRC with a document that contains an error with the intention that HMRC should rely upon it as an accurate document...

65. The Upper Tribunal referred to [47] of *Tooth* which we have quoted above and then stated as follows:

[40] As the Court of Appeal held in *E Buyer*, it is not necessary for HMRC to plead or prove dishonesty in order to establish *Kittel* knowledge (ie that the taxpayer 'knew or should have known' that the transactions were connected to fraud). Mr McDonnell argued that a finding of dishonesty was, however, an essential element of deliberate inaccuracy for the purposes of the penalty assessment, such that the findings in the 2017 Decision could not suffice to establish deliberate inaccuracy.

[41] We disagree. There is in our judgment no requirement for HMRC to plead or prove dishonesty when seeking to impose a penalty for deliberate inaccuracy under Sch 24 FA 2007. As the FTT held in *Auxilium*, deliberate inaccuracy occurs when a taxpayer knowingly provides HMRC with a document that contains an error with the intention that HMRC should rely upon it as an accurate document. We do not consider that anything said by the Supreme Court in *Tooth* calls that test into question.

66. Mr Bedenham submitted that the Upper Tribunal in *CF Booth* was wrong to find that there was no requirement for HMRC to plead or prove dishonesty when seeking to impose a penalty under Schedule 24 FA 2007. There appeared to have been limited submissions on the issue and no reasoning in the decision of the Upper Tribunal.

67. Mr Ripley accepted that the reasoning of the Upper Tribunal in *CF Booth* is somewhat truncated but submitted that the conclusion of the Upper Tribunal was nevertheless correct. We should follow that decision as a matter of judicial comity unless we are satisfied that it is plainly wrong.

68. We are satisfied that the Upper Tribunal in *CF Booth* was right to conclude that dishonesty is not an essential element of a deliberate inaccuracy. It is supported by the Court of Appeal decision in *Citibank NA and E Buyer UK Ltd v HM Revenue & Customs* [2017] EWCA Civ 1416 ("*E Buyer*"). That case involved an allegation of MTIC fraud. HMRC alleged that the taxpayer knew or should have known that its transactions were connected with a fraudulent scheme. An issue arose as to whether HMRC had sufficiently pleaded its case. The then Chancellor, Sir Geoffrey Vos, noted at [69] that the Upper Tribunal's decision was somewhat equivocal as to whether an allegation that the taxpayer knew that its transaction were connected with fraud necessarily imported dishonesty on the part of the taxpayer. In certain passages it said that a pleading of knowledge would not always require a pleading of dishonesty. In other passages it appeared to regard an allegation of actual knowledge of the fraud as automatically involving an allegation of dishonesty and could not see how a trader could honestly proceed with a transaction if it knew that the transaction in question was part of a scheme to defraud the revenue.

69. The Court of Appeal overturned the decision of the Upper Tribunal. HMRC had to give full particulars of actual or constructive knowledge. The question of whether the taxpayer's alleged conduct might implicitly amount to dishonesty was irrelevant. If dishonesty or fraud had been alleged, then HMRC would have to plead, particularise and prove dishonesty. Sir Geoffrey Vos summarised his conclusions at [85] and [90]:

85. The key point, in my judgment, is that, whilst HMRC can, of course, allege that a taxpayer has acted dishonestly and fraudulently in relation to the transactions to which it was a party, they do not need to do so in order to deny that taxpayer the right to reclaim input tax under the *Kittel* test. The exercise upon which Judge Mosedale was engaged was, therefore, inappropriate. It was simply irrelevant for the F-tT to ask whether the allegations in the statement of case, if all proved, would necessarily lead to the conclusion that the taxpayer had been dishonest or fraudulent. It was even more inappropriate for Judge Mosedale to direct HMRC to plead dishonesty when it had expressly informed her that it did not wish to make any such allegation. It might be, of course, that if some or all of the allegations made in the statement of case were proved, that might (in theory, though not, of course, in practice) have allowed a tribunal to go on to make a finding that the taxpayer had been dishonest. But if HMRC does not seek such a finding, and if such a finding is not needed to support the conclusion that the taxpayer cannot recover its input tax, there is neither any need nor any utility in asking the F-tT to undertake that exercise.

...

90. 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.

70. We take the reference in parentheses to “*in theory, though not, of course, in practice*” at [85] as making the point there could be no finding of dishonesty unless it had been fully pleaded and put to relevant witnesses.

71. Hallett LJ stated at [106], [107] and [109]:

106. It follows that an order requiring HMRC to plead dishonesty, on the basis it alleges actual knowledge of participation in a fraud, would have the effect of significantly and unnecessarily raising the bar, in terms of what it must prove to deny the taxpayers’ claims and the cogency of the evidence called.

107. I recognise that proof of participation in an MTIC fraud with actual knowledge of the fraud may be powerful evidence of conduct contrary to normally acceptable standards of honest conduct, and dishonesty in that objective sense. It may also provide powerful evidence of dishonesty in the subjective sense, if that additional element is required (as E Buyer appears to maintain). The line between honest conduct and dishonest conduct may be a fine one, in such circumstances. None the less, there is a line and entering into a transaction knowing that it is connected with fraud does not necessarily equate to dishonest conduct in either the objective or the subjective sense.

...

109. In summary, in my view, if HMRC do not wish and do not need to plead dishonesty, the concept of dishonesty should not be raising its head. As Sir Geoffrey Vos C has observed, an analysis of whether the allegations amounted to dishonesty was unnecessary and inappropriate in litigation of this kind. Traders should not have to face a plea of dishonesty, HMRC should not be obliged to take on the burden of proving dishonesty, and judges should not have to address the added unnecessary complication of dishonesty simply on the basis HMRC seeks to prove actual knowledge of a fraud, in accordance with the Kittel test, and relies on facts and or inferences from facts that could support a finding of dishonesty.

72. Etherton LJ stated at [119] and [120]:

119. The complexity has arisen through entanglement over the extent to which the first limb of the Kittel test necessarily or ordinarily will involve an allegation of dishonesty and, if so, the implications of that on the extent to which particulars must be given of that dishonesty. The issue of dishonesty in this context is, however, a digression from the critical issue, which is one of actual or constructive knowledge, namely that the trader will not be able to reclaim input tax if it knew or should have known that the transaction in which it was involved was connected with a scheme for the fraudulent evasion of VAT.

120. It was common ground before the UT and is common ground before us that the Kittel test does not require dishonesty. Unless dishonesty is expressly alleged, the only question is whether the pleaded allegations are relevant to the issue of actual or constructive knowledge for the purposes of the Kittel test: if not, they are irrelevant and should be struck out or at least ignored, and, if they are, the only question is whether they are sufficiently particularised to enable the taxpayers fully to understand the case against them and to enable the F-tT to achieve the overriding objective of dealing with the case fairly and justly. For that reason, it is entirely irrelevant whether dishonesty is implicitly alleged in HMRC's statements of case.

73. Mr Bedenham submitted that *E Buyer* was authority only for a principle that actual knowledge in the context of *Kittel* does not necessarily amount to dishonesty and that HMRC are not required to plead dishonesty in MTIC appeals. We do not accept that the reasoning in *E Buyer* is so limited. In our view the reasoning applies equally if not with more force to what is a statutory test in the present context. Parliament chose to use the straightforward concepts of deliberate behaviour and a deliberate inaccuracy using “*easily understood definitions*”. As the Supreme Court held in *Tooth*, those concepts imported the need for intentional conduct. In particular, an intention to mislead. It is notable that Parliament did not impose any requirement of dishonesty. If dishonesty was a requirement, then we would have expected Parliament to say so expressly.

74. We should also mention the case of *Danapal v HM Revenue & Customs* [2023] UKUT 86 (TCC) which was relied on by the appellant. In that case, the FTT had made a finding that the taxpayer's accountants had deliberately produced an inaccurate return on behalf of the taxpayer. However, HMRC had not pleaded any allegation of deliberate conduct on the part of the accountants and had not put any such allegation to the taxpayer. The accountants had not given evidence. One ground of appeal by the taxpayer was that the FTT had not been entitled to find that there was a deliberate inaccuracy.

75. In the Upper Tribunal, HMRC accepted that the finding of deliberate behaviour on the part of the accountants could be characterised as a finding of dishonesty. It was also the case that there was no pleaded allegation of deliberate conduct by the firm, the firm did not give evidence and the firm had no opportunity to refute the finding of dishonesty. The Upper Tribunal found that in those circumstances the FTT had not been entitled to make the finding and allowed the appeal on that ground.

76. In our view, *Danapal* does not assist the appellant. It is not disputed that a deliberate inaccuracy may involve dishonesty and in that case HMRC had accepted that the FTT's finding could be characterised as a finding of dishonesty. There is no such acceptance in this appeal.

77. Following the hearing of the present appeal, the Upper Tribunal (Marcus Smith J and Judge Brannan) released its decision in *Delphi Derivatives Limited v HM Revenue & Customs* [2026] UKUT 21 (TCC) which also considers the question of whether deliberate inaccuracy in a tax return necessarily involves an allegation of dishonesty. We invited the parties to make further written submissions in light of that decision.

78. In *Delphi Derivatives*, the taxpayer contended that the FTT had not referred to or applied the test of deliberate inaccuracy set out in *Tooth* and had not made any finding that the directors knew the taxpayer's returns were inaccurate or that they intended to mislead HMRC. HMRC contended that the FTT had applied the test described by the FTT in *Auxilium* and that test had been endorsed by the Upper Tribunal in *CF Booth*.

79. The Upper Tribunal reviewed the authorities including *Tooth*, *CF Booth* and *E Buyer*. At [169] the Upper Tribunal stated that it was worth spending some time explaining the decision in *CF Booth*. Having set out the background, the Upper Tribunal stated:

171. It was against that background that this Tribunal in *CF Booth* held that it was not necessary for HMRC, when imposing a penalty for "deliberate inaccuracy", to plead or prove dishonesty or fraud. The taxpayer knew of the circumstances which disqualified it from obtaining a tax relief/credit but nonetheless claimed it. This is consistent with the Supreme Court's decision in *Tooth* at [32] and [35], where it was recognised (quoting from [35]) that "the requirement for a deliberate inaccuracy (in section 118(7)) appears on a scale of blameworthy conduct ranging from mere conscious advertence at the bottom to something tantamount to fraud or dishonesty at the top".

172. In cases involving the imposition of a tax penalty the burden of proof, of course, lies on HMRC. We have little doubt that in many cases where deliberate inaccuracy is alleged those cases *may* involve dishonesty or fraud, but pleading dishonesty or fraud is not a requirement of the penalty statute, particularly if what is alleged is a "conscious advertence" at the bottom end of the scale. There will be cases in which HMRC expressly seek to allege dishonesty and the usual rules about pleading and particularisation, and the need to give the taxpayer a proper opportunity to reply, will apply. However, the penalty statute simply asks whether there is an inaccuracy and whether that inaccuracy is deliberate. These are perfectly straightforward English words which do not require resort to a Thesaurus or alternative judicial paraphrasing. There is no need to over-elaborate the statutory requirement. We do not consider judicial interpretations of the test of deliberate inaccuracy in *Auxilium*, *CF Booth* or *Tooth* to be, in any material sense, different. For our part, we are content to adopt the test in *Tooth* at [47] as the definitive guidance on this point. As to the degrees of culpability, clearly deliberate inaccuracy which is concealed is more likely to involve dishonesty.

80. The Upper Tribunal referred to [35] of *Tooth* where the Supreme Court described the issues before it:

35. The issues on this appeal divide cleanly into two groups. The first group of issues (in terms of historical time) relate to the question whether the "deliberate" limb of the first condition for a discovery assessment was fulfilled, because of the way in which Mr Tooth and his advisors completed his 2007-8 tax return in 2009. That depends in part upon what may loosely be described as the place where the requirement for a deliberate inaccuracy (in section 118(7)) appears on a scale of blameworthy conduct ranging from mere conscious advertence at the bottom to something tantamount to fraud or dishonesty at the top...

81. It appears to us that the Supreme Court at [35] was simply acknowledging HMRC's argument that a deliberate inaccuracy included a deliberate statement which turned out to be

inaccurate. It seems likely that is what the Supreme Court meant by “mere conscious advertence”. However, the Supreme Court went on to reject this argument at [42] – [47]. We have already pointed to paragraphs in the decision of the Supreme Court which suggest that dishonesty is not a requirement of deliberate conduct. If the Upper Tribunal in *Delphi Derivatives* was saying that there is a similar suggestion in [32] and [35] of *Tooth* then we would not endorse that aspect of its decision. Otherwise, we agree with its observations at [171] and [172] that *CF Booth* is consistent with *Tooth* and that a deliberate inaccuracy may, but will not necessarily, involve dishonesty.

82. Mr Bedenham submits that the Upper Tribunal in *CF Booth* and *Delphi Derivatives* did not identify any circumstances where deliberate behaviour might not involve dishonesty. In such a fact sensitive scenario we do not consider that surprising. The Supreme Court in *Tooth* clearly anticipated that there were such circumstances. We note also that the Court of Appeal in *E Buyer* did not specify circumstances where a taxpayer might honestly enter into a transaction knowing that it was connected with fraud. As Hallett LJ stated in *E Buyer*: “*the line between honest conduct and dishonest conduct may be a fine one...*”.

### **(3) Was HMRC required to plead and prove dishonesty?**

83. If deliberate conduct necessarily involves dishonesty then the appellant says that it is not sufficient for HMRC to plead and put a case of deliberate inaccuracy. HMRC are required to plead and put a case of dishonesty. We have found that deliberate inaccuracy does not necessarily involve dishonesty but we shall in any event address this aspect of the appellant’s case.

84. Mr Bedenham suggested that the word “deliberate” was the same type of word described by Millett LJ in *Armitage v Nurse* that should not be sprinkled in a pleading. We do not accept that submission in circumstances where what was pleaded by HMRC was the very word used by Parliament in the various statutes.

85. We were also referred to *Invest Bank PSC v El-Husseini* [2024] EWHC 1235 (Comm) where Bryan J stated at [39]:

39. Fraud must be distinctly alleged and distinctly proved as against each defendant so that it is clear what is said against each person. Where the same plea is rolled up against multiple individuals, it will not be clear whether the particulars alleged do in fact relate to a specific defendant (which is impermissible). Likewise, where a rolled-up plea relates to multiple causes of actions, e.g. negligence and fraud, it is not clear whether a particular is said to support a case in (in this example) fraud, or merely negligence ...

86. Mr Bedenham suggested that the present case was a rolled-up allegation of deliberate behaviour against two directors and the FTT found that both would have known that the returns were inaccurate. We do not accept that submission. Bryan J was referring to situations where it is not clear which particulars relate to which defendants or whether specific particulars are said to support a case of fraud or merely negligence. In the present case, it was clear that it was being alleged that both directors were aware of inaccuracies in the returns and were responsible for deliberate inaccuracies. That case could only be put to Mr Paudel because he was the only director to give evidence. In any event, this criticism does not form part of the ground of appeal.

87. Mr Bedenham accepted that it was not necessary to use the word “dishonest”, but that HMRC were required to make the allegation in unequivocal terms. His principal submission was that it was not enough for HMRC to put to Mr Paudel that he knew at the time that the returns were inaccurate and that the result would be an under-declaration of tax. It had to be put that he was thereby acting dishonestly.

88. Mr Bedenham also accepted that Mr Paudel knew that what was being put to him was that he had deliberately misled HMRC by putting in an inaccurate return. However, he submitted that Mr Paudel did not know that the allegation was that he was being dishonest and therefore HMRC could not establish their case of deliberate inaccuracy. Further, it was not clear that an allegation of dishonesty was being made because the FTT itself said at [241] that it did not consider that an allegation of dishonesty was being made.

89. As to the latter point, the appellant's counsel at least must have understood, albeit wrongly, that HMRC were alleging dishonesty because no pleading point was taken. The point being addressed by the FTT at [238] – [241] was the appellant's failure to put dishonesty to Mr Paudel in cross-examination.

90. Mr Bedenham's criticism was that HMRC had not put the second limb of *Ivey v Genting Casinos* to Mr Paudel and Mr Paudel therefore had no opportunity to say why he had not been dishonest. In other words, what HMRC failed to put to Mr Paudel was that his actions in knowingly submitting an inaccurate return which he knew would result in an under-declaration of tax were objectively dishonest. In effect, HMRC were required to plead and put their case as follows:

- (1) Mr Paudel knew that the appellant had bought and sold stock and that those transactions were not included in the appellant's records.
- (2) Mr Paudel knew that the appellant's tax returns were inaccurate and understated its liability to tax.
- (3) Mr Paudel thereby intended to mislead HMRC.
- (4) The returns were therefore deliberately inaccurate.
- (5) That conduct was dishonest applying the standards of ordinary decent people.

91. The criticism is essentially a matter of procedural fairness, as described by the Supreme Court in *TUI UK Ltd v Griffiths*. The appellant does not say that HMRC failed to plead or put its case by reference to the matters described at (1) to (4) above. We do not consider that in the circumstances of this case there was any procedural unfairness in HMRC putting their case by reference to those matters, but not putting to Mr Paudel that his conduct was objectively dishonest applying the standards of ordinary decent people.

92. If the appellant was right that deliberate inaccuracy implicitly involves dishonesty then we do not see why it is not sufficient for HMRC to allege and put to Mr Paudel that he knew at the time that the returns were inaccurate, that the result of submitting the returns would be an under-declaration of tax and that he intended to mislead HMRC.

93. The FTT noted at [310] the way in which HMRC put its case on the discovery assessments:

310. In order to satisfy paragraph 43 Schedule 18 the loss of tax must have been brought about by the careless or deliberate behaviour of the appellant or someone acting on their behalf. HMRC have argued that the behaviour in this instance was deliberate. That is on the basis that both of the directors knew that income was payable to the appellant, albeit it had been collected by them ostensibly in their capacity as directors of the appellant, but that income was not reflected in the accounts or tax returns. It was the directors who made all of the purchases and sales so they would have known the large sums of money that were passing through their hands. The accounts simply did not reflect that.

94. Mr Bedenham submitted that this was not sufficient. They were required to put to Mr Paudel that his conduct was dishonest and ordinary people would think it was dishonest. That would have given Mr Paudel an opportunity to say why he had not acted dishonestly.

95. We agree that it was necessary for Mr Paudel to have an opportunity to rebut the allegation of deliberate inaccuracy being made against him. Here, HMRC pleaded that the directors knew that the returns made by the appellant were inaccurate. In our view that was sufficient. As Lewison J noted in *Mullarkey v Broad*, it is not necessary to use the word “dishonest”. The facts alleged may sufficiently demonstrate that dishonesty is being alleged. In our view that would have been the case here.

96. The relevant statutory provisions in this case refer to deliberate behaviour which was fairly and squarely pleaded and put to the appellant’s witness. In those circumstances, the FTT must be entitled to find deliberate behaviour. The facts were particularised in HMRC’s statements of case and developed in HMRC’s skeleton argument. It was not suggested that HMRC had not fairly pleaded their allegation that the returns included a deliberate inaccuracy which led to an under-statement of tax or that there was an intention to mislead HMRC. We cannot see that there was any procedural unfairness. Indeed, it would be odd if clearly pleading the statutory requirements for a cause of action was insufficient to maintain that cause of action. The appellant was entitled to know the case against it, and it did know the case against it. The appellant’s counsel appears to have equated that case to an allegation of dishonesty, even though HMRC had not expressly pleaded or put any case based on dishonesty. It is difficult to see therefore how any unfairness arose from HMRC’s pleadings or the way in which they put their case to Mr Paudel.

97. Mr Bedenham submitted that Mr Bhattachan might have wanted to give evidence if he had known that he was being depicted as dishonest. In our view it is unrealistic to think that he might have wanted to give evidence if being accused of dishonesty, but not when he was being accused of making a return knowing it to be inaccurate with the intention of misleading HMRC.

98. The FTT referred to *Tooth* and identified the need to establish an intention to mislead HMRC. The appellant accepts that is the correct test for what is a deliberate inaccuracy. Ultimately, the question the FTT had to address was whether there were deliberate inaccuracies in the appellant’s returns. It found that there were and it applied the correct test as per *Tooth*.

#### **(4) Did the FTT err in failing to explain how the appellant’s conduct might not involve dishonesty?**

99. The appellant says that even if deliberate conduct does not necessarily involve an allegation of dishonesty, it is difficult to see how the FTT could have reached its conclusion that there was deliberate intention to mislead HMRC without making a finding that the appellant’s conduct constituted or was tantamount to a finding of dishonesty. Mr Bedenham submitted that it was incumbent on the FTT to explain how on the facts as found the appellant could have made a deliberately inaccurate return without being dishonest.

100. In support of that submission, Mr Bedenham relied on a judgment of the Divisional Court in *Brett v The Solicitors Regulation Authority* [2014] EWHC 2974. The case concerned an appeal by a solicitor against a decision of the Solicitors’ Disciplinary Tribunal (“the SDT”) that he should be suspended from practice. The SDT found that he had knowingly allowed the court to be misled in the conduct of litigation in breach of Rule 11.01 of the Solicitors Code of Conduct. Rule 11.01 provided that “*you must never deceive or knowingly or recklessly mislead the court*”. Guidance in the Code of Conduct stated that there was a distinction in Rule 11.01 between deceiving the court when knowledge is assumed and misleading the court which could happen inadvertently.

101. The SDT disavowed any finding that Mr Brett had acted dishonestly but did find that he had knowingly allowed the court to be misled. Mr Brett challenged that contradiction in the

SDT's decision. He contended that the SDT's conclusion implicitly involved a finding of dishonesty against him and was indistinguishable from an allegation of deceit which was not specifically charged but could have been.

102. Wilkie J (with whom Lord Thomas LCJ agreed) stated at [96] – [98]:

96. The next issue is whether the SDT, on the material before it, was wrong to conclude that Mr Brett allowed the court to be misled “knowingly”. In my judgment there is a fundamental difficulty with the decision of the SDT. It had been invited by the [Solicitors Regulation Authority] to approach its task on the basis that it was not being alleged that Mr Brett was deceitful in misleading the court. The charge was not framed in that way but alleged knowing misleading of the court. The SDT adopted that approach and expressly disavowed any question of it being alleged, or of their finding, that Mr Brett had acted dishonestly. True it is that Rule 11.01 prohibits a solicitor from deceiving the court, or knowingly misleading the court. The rule is drafted on the basis that there may be cases in which a solicitor may knowingly mislead the court but not deceive the court. For my part I find that an extremely difficult distinction to draw in its general application. I find it even more difficult to draw in the circumstances of this case. Whilst it may be that, as Mr Dutton QC argues, a solicitor, who knows he is misleading the court but does so because of a mistaken belief that he is obliged to do so in order to protect the confidence of a witness, may not be acting “dishonestly”, it is by no means an obvious conclusion and would need to be spelt out before the reader of the decision would be prepared to draw the conclusion that Mr Brett had not been found guilty of a charge of dishonesty.

97. ... The allegation was that Mr Brett allowed the court to be misled on this fundamental matter knowing that it was being thus misled. I find it hard to see how that allegation could be made good without impugning to Mr Brett's honesty.

98. In my judgment, the SDT having disavowed making any finding of dishonesty could not properly then proceed to make a finding that Mr Brett “knowingly” allowed the court to be misled in the circumstances of this case which was, without more, in effect, a finding of dishonesty. If it intended not to make a finding of dishonesty whilst finding the charge of knowingly misleading proved, it would have to have spelt out its analysis of how it came about that he acted knowingly though not dishonestly. That might have been on the basis put forward by Mr Dutton QC, but in the absence of any such reasoning the reader of the decision is forced to the conclusion that the SDT has come to a finding of dishonesty against Mr Brett despite stating that it did not intend to do so. That is an unsatisfactory state of affairs and, in my judgment, amounts to the SDT having got that part of the decision “wrong”.

103. The Divisional Court therefore quashed the SDT's decision that Mr Brett had knowingly misled the court, but substituted for it a decision that he had recklessly misled the court.

104. Lord Thomas in *Brett* stated at [112] that where a representative leads the court to believe something they know not to be true:

... the inference will be inevitable that he has deceived the court, acted dishonestly and is not fit to be a member of any part of the legal profession.

105. This was described by Carr J (as she then was) in *Shaw v Solicitors Regulation Authority* [2017] EWHC 2076 (Admin) at [83] (not cited) as a rebuttable presumption. We can see why that presumption would arise in the circumstances of solicitors' regulatory proceedings and why the SDT was duty bound to explain why the presumption was rebutted in that case.

106. It is important to note that the judgment in *Brett* says nothing about the requirement to plead full particulars of an allegation of dishonesty, or the requirement to put that allegation to the witness. That was presumably because the SRA presented its case on the basis that there was no allegation of dishonesty and the SDT expressly disavowed any finding that Mr Brett had acted dishonestly. It was not the failure to plead dishonesty or the failure to put dishonesty

to Mr Brett in cross-examination that was the subject of criticism. It was the SDT's failure to spell out in its decision how Mr Brett could knowingly mislead a court without being dishonest.

107. There are superficial similarities between the issue in *Brett* and the issue on this appeal. HMRC, like the SRA, did not put its case on the basis of dishonesty. However, the FTT specifically recognised at [241] that there were circumstances in which a deliberate inaccuracy in a return would not involve dishonesty. That is a point of distinction between the present case and *Brett*. The FTT's statement that a deliberate inaccuracy does not necessarily involve dishonesty was consistent with what the Supreme Court had said in *Tooth*. It was consistent with what the Upper Tribunal had said in *C F Booth*, albeit not cited by the FTT. It is also consistent with what the Upper Tribunal has subsequently said in *Dephi Derivatives*. It is now well established that deliberate inaccuracy does not necessarily involve dishonesty.

108. The Divisional Court in *Brett* could not be satisfied that the SDT was entitled to make a finding that Mr Brett had knowingly misled the court without explaining how that could happen without any dishonesty on Mr Brett's part. It was clearly unfair to Mr Brett that such a finding should be made in circumstances where there was an inevitable inference of dishonesty and the case against Mr Brett had not been pursued on the basis of dishonesty. In the context of such disciplinary proceedings that was clearly unfair. It left an unwarranted stain on Mr Brett's character and integrity.

109. In the present case, the FTT was concerned with the statutory distinction between deliberate inaccuracies and careless inaccuracies. It did not need to consider whether the appellant had acted dishonestly, overlaying the common law test for dishonesty. Unlike the SDT in *Brett*, the FTT did not disavow any finding that the appellant had made a return containing a deliberate inaccuracy. It simply treated dishonesty as irrelevant which is what the Court of Appeal did in *E Buyer*.

110. In the circumstances, we do not consider that there was any requirement for the FTT to explain how the appellant's conduct might not involve dishonesty.

#### CONCLUSION

111. For the reasons given above, we do not consider that the FTT erred in finding that the appellant had deliberately understated its tax liabilities where HMRC had not pleaded or put that it had acted dishonestly. The appeal is therefore dismissed.

**MR JUSTICE NICHOLAS THOMPSELL  
JUDGE JONATHAN CANNAN**

**Release date: 12 March 2026**