Neutral Citation: **[2024] UKUT 390 (TCC)**
UPPER TRIBUNAL
TAX AND CHANCERY CHAMBER

Applicant: New Claire Wine Ltd	Tribunal Ref: **UT-2024-000095**
Respondents: The Commissioners for His Majesty's Revenue and Customs	

RECONSIDERATION OF APPLICATION FOR PERMISSION TO APPEAL FOLLOWING ORAL HEARING

DECISION NOTICE

JUDGE RUPERT JONES

Introduction

1. The Applicant, New Claire Wine Ltd, applies to the Upper Tribunal (Tax and Chancery) ("UT") for permission to appeal the decision of the First-tier Tribunal (Tax Chamber) ("the FTT"), constituted as Judge Anne Scott and Member Leslie Brown, released on 4 January 2024 ("the Decision"). The appeal was decided by the FTT following a hearing conducted between 30 January and 2 February 2023.

2. The FTT dismissed the Applicant's appeal in principle (albeit with minor adjustments to the amounts of the assessments and penalties) against the following decisions of HMRC:

> (a) Five assessments being discovery assessments under Schedule 18 paragraph 41 Finance Act 1998 ("FA 1998") in respect of Accounting Periods Ending ("APE") 31 January 2013, 2014, 2015, 2016 and 2017. Together, those assessments for Corporation Tax total £250,654.68;
>
> (b) VAT assessments totalling £176,656 under section 73 Value Added Tax Act 1994 ("VATA") for the VAT periods ending 06/2012 to 03/2017 inclusive by way of a Notice of Assessment dated 3 December 2018; and
>
> (c) a penalty notice dated 6 November 2019 under Schedule 24 Finance Act 2007 ("FA 2007") for deliberate (but not concealed) inaccuracies in tax returns submitted to HMRC by way of a Notice of Penalty dated 6 November 2019.

3. By a decision dated 3 July 2024 ("the PTA Decision"), Judge Blackwell refused permission to appeal the FTT's Decision to the UT on the grounds of appeal pursued by the Applicant. The Applicant renewed its application to the UT for permission to appeal in-time on 25 July 2024.

4. On 3 October 2024 I refused permission to appeal to the UT on the papers in relation to all three grounds of appeal then pursued by the Applicant.

5. The Applicant requested that permission to appeal be reconsidered at an oral hearing. That hearing took place on 28 November 2024 by video (CVP). Mr David Bedenham of counsel appeared for the Applicant having filed a skeleton argument. I am very grateful to him for the quality of his written and oral submissions.

UT's jurisdiction in relation to appeals from the FTT

6. An appeal to the Upper Tribunal from a decision of the FTT can only be made on a point of law (section 11 of the Tribunals, Courts and Enforcement Act 2007). The Upper Tribunal has a discretion whether to give permission to appeal. It will be exercised to grant permission if there is a realistic (as opposed to fanciful) prospect of an appeal succeeding, or if there is, exceptionally, some other good reason to do so: Lord Woolf MR in *Smith v Cosworth Casting Processes Ltd* [1997] 1 WLR 1538.

7. It is therefore the practice of this Chamber of the Upper Tribunal to grant permission to appeal where the grounds of appeal disclose an arguable error of law in the FTT's decision: grounds with a realistic prospect of success which allege errors of law which are material to the outcome of the case.

The grounds of appeal

8. The Applicant's representative had originally filed submissions containing three grounds of appeal arguing that the FTT erred in law in making its Decision. The submissions and original grounds were drafted by Mr Geraint Jones KC who had appeared for the Applicant at the hearing before the FTT.

9. Mr Bedenham now appears for the Applicant On making the application for reconsideration of permission he advanced one reformulated ground of appeal (Ground 1) and one new ground of appeal (Ground 2).

Discussion, Analysis and Decision

<u>First ground of appeal</u>

The Applicant's argument

10. Mr Bedenham submits that the fact finding of the FTT was flawed or unreliable by reason of the inordinate delay in the FTT producing the Decision which was delivered some 11 months after the hearing. He relies on the fact that the FTT found that Mr. Paudel (the Applicant's

director) was not a credible witness (see paragraphs 217-237 of the FTT Decision) which conclusion was relevant to the FTT's conclusion that the Appellant conduct was "deliberate" (see paragraphs 353 and 310) (and indeed any "fall back" finding of carelessness).

11. He argues that the assessment of Mr. Paudel's credibility (which was in part based on the FTT's assessment of his responses to questions asked of him during the course of the hearing – see for example paragraphs 225 and 236) is necessarily undermined by the passage of time. As Peter Gibson LJ observed in *Goose v Wilson Sandford* [1998] TLR 85 (where there was a 20 month delay in issuing the judgment):

> "113. Because of the delay in giving judgment, it has been incumbent on us to look with especial care at any finding of fact which is now challenged. In ordinary circumstances where there is a conflict of evidence a judge who has seen and heard the witnesses has an advantage, denied to an appellate court, which is likely to prove decisive on an appeal unless it can be shown that he failed to use, or misused, this advantage. We do not lose sight of the fact that the judge had transcripts of the evidence, as well as very extensive written submissions from counsel. But the very fact of the huge delay in itself weakened the judge's advantage, and this consideration had to be taken into account when we reviewed the material which was before the judge. In a case as complex as this, it is not uncommon for a judge to form an initial impression of the likely result at the end of the evidence, but when he has come to study the evidence (both oral and written) and the submissions he has received with greater care, he will then go back to consider the effect the witnesses made on him when they gave evidence about the matters that are now troubling him. At a distance of 20 months, Harman J. denied himself the opportunity of making this further check in any meaningful way. …"

The Tribunal's determination

12. I reject this ground as I am not satisfied that it gives rise to an arguable error of law in the FTT's Decision.

13. I recognise that any delay over three months without good reason in producing a decision following a hearing is, in most cases, not acceptable. This is for the reasons set out in *NatWest Markets Ltd and another v Bilta (UK) Ltd (in liquidation)* [2021] EWCA Civ 680. Of course, some allowance might be given for the time taken to prepare a judgment in relation to a half day hearing compared to a three-month trial.

14. We do not know the reason for the delay in producing the Decision in this case but do know Judge Blackwell when considering the PTA application on 3 July 2024 recorded that Judge Scott was 'on long-term sick leave and, as such, is unavailable at present to determine the application'.

15. I take into account that there is no positive explanation for the delay in producing the Decision in this case. Nonetheless, delay itself is not sufficient ground for granting leave to appeal. That is clear from *HMRC v Marlborough DP Limited* [2024] UKUT 00098 (TCC). However, delay may weaken the deference on review of challenges to the FTT's findings of fact: *Marlborough* at [111].

16. In this ground the finding of fact challenged as being made in error of law is that Mr Paudel's oral evidence was not credible. The FTT considered Mr Paudel's oral evidence at [217]-[237] giving reasons for rejecting it. These include the following paragraphs at [220]-[237]:

220. No explanation whatsoever, beyond the suggestion in the notes that the omission had been a mistake, has been advanced for such a substantial omission from a tax return. Moving from a declaration of no income to income of in excess of £29,000 is certainly not a minor matter. That does not support the assertion that he was a "man of good character".
221. The confirmation from VKM in the letter of 3 March 2017 (see paragraph 135 above), that Mr Paudel had confirmed that the appellant used only the Lloyds and Halifax bank accounts did not assist him. Not only was there the Barclays account, which both the Bottle Stop and the appellant used, but HMRC had identified a number of other bank accounts to which payments had been made and he has failed to produce evidence of those.
222. In a similar vein, his bland assertion in his witness statement at paragraph 28(6) does not help him. He was referring to paragraph 17.4 of HMRC's Statement of Case which stated "there were instances on which goods were purchased using debit cards not associated with the Appellant's bank account". He said that "I have discussed this with my co-Director, and we have no knowledge of any other debit/credit cards being used for purchases" but that does not sit well with VKM's letter of 12 December 2017 (see paragraph 146(m) above).
223. Further, HMRC had given the appellant details of the numbers on the debit cards which had been identified from the appellant's records. VKM mention credit cards but Officer Dyson's evidence was that he did not know whether the appellant or the directors had credit cards since no information had been provided.
224. We have also identified the differing explanations about the initial funding (see paragraph 146(f) above) in relation to the letter of 12 December 2017 from VKM.
225. In Closing Submissions it was argued that there were only small differences between Mr Paudel's oral evidence and that letter. With respect we disagree and we find that Mr Paudel's evidence in that regard was not persuasive. Mr Jones asked him in re-examination if he had seen that letter before it was issued. Firstly, he said that he could not say but then he argued that his English was not good enough to have enabled him to understand it. That does not sit well with the choice to decline the services of an interpreter at the hearing. We find that that letter is an accurate description of the instructions given to VKM at the time.
226. Officer Dyson's evidence, and he was specifically asked about it, was that at the meeting in May 2017, Mr Paudel had understood everything and that Messrs Mehta and Khadka, the Chairman and Director of VKM, had participated. VKM's letters are very clear in their terms and explicit in stating that they have taken instructions.
227. In his Closing Notes, Mr Jones said that Mr Paudel had been criticised for his evidence to the effect that he had no recollection of seeing the notes of the May 2017 meeting or having discussed them with his agents. In re-examination, he had indeed repeatedly said that he could not remember when he saw the notes etc.
228. However, prior to that we have him noted as saying, when asked why he had not challenged the notes, that he had never seen the notes, then he said that he had never noticed and never read them. He then said that he had read them but he had missed the paragraphs that he now contested, being theft and wastage etc.
229. This is a specialist Tribunal and we are well aware that some taxpayers do not read such notes. To fail to do so is not the action of a prudent taxpayer. In this instance, all five of the appellant's agents would have been aware of the importance of those notes, the fact that Officer Dyson's assessments, including the section 445 charges, were in large measure predicated on the information in those notes and the fact that the burden of proof when disputing the assessments lies with the taxpayer.
230. It was not only Officer Dyson who relied on the notes of that meeting. The Review Conclusion letter for VAT dated 8 August 2019 had no less than 21 bullet points which narrated the facts upon which HMRC relied that were derived from that meeting. HMRC's Statements of Case also referenced the notes of the meeting as did their Skeleton Arguments.
231. In his witness statement, at paragraph 15, Mr Paudel stated that, prior to the 16 May 2017 meeting, in March 2017, Officer Dyson had contacted the appellant "in regards to cash payments retained in records of TIWC". That is simply inaccurate. The first time that Officer

> Dyson asked about TIWC was at that meeting and it was at the very end of the meeting. It was restricted to:
> (a) asking the directors if they had ever stocked Villa Radiosa and Mr Paudel replied in the affirmative and denied that there had been any purchases beyond the four purchases that had been identified from the delivery notes and invoices by HMRC, and
> (b) Officer Dyson asked him to think carefully about that, referred to the penalty fact sheet and asked him to discuss the matter with VKM.
> 232. Mr Paudel's witness statement referenced the HMRC Statement of Case and disputed 11 paragraphs. One paragraph that was not disputed was paragraph 20 which narrated 21 facts that it was stated had been confirmed by the directors at the meeting.
> 233. Mr Paudel, and therefore the appellant, has been professionally advised throughout, so whether he read the notes or not, he was certainly on notice as to the contents. We do not find his explanation that he did not know the detail of the notes to be credible.
> 234. Mr Paudel told the Tribunal that "everything is recorded" and when taken to the spreadsheet with Potential Additional Sales he initially said that he did not accept that there were poor records or errors. Ultimately, he said that he accepted that there were errors in the records. When asked if that meant that there would be errors in the accounts, his response was that he did not have a clue about such things.
> 235. In his witness statement he had argued at paragraph 25 that the stock flow exercise had not taken account of stock that was damaged, lost, stolen, out of date or seized by HMRC (being what was challenged in relation to the records of the meeting). He confirmed that HMRC had seized 14 or 15 pallets in 2015 because duty had not been paid. In fact, the spreadsheet for the Potential Additional Sales had a column headed "Seized Stock" and the calculations added that back in so Officer Dyson certainly had taken that into account.
> 236. In summary, whilst we accept that there has been a considerable elapse of time, in his oral evidence there were numerous questions to which his answer was that he could not remember. However, he stated that he recalled what was said at the May 2017 meeting about theft and similar matters. He did remember that they shopped for stock every day and paid in cash most of the time because it was cheaper due to bank charges. When the appellant paid by cheque then they deposited money in the bank in order to cover the payment. In re-examination Mr Paudel said that records of all payments by debit cards should be placed in the "purchase file" and when asked if he was confident that all records would be there he said that there "could be mistakes" but he was not sure.
> 237. We were not persuaded that Mr Paudel was a credible witness.

17. The Applicant does not challenge the FTT's reasoning in the Decision as either being inaccurate, insufficient or irrational. Mr Bedenham simply submits that the delay deprived the FTT judge from comparing the notes of Mr Paudel's evidence with the effect that the witness had upon her at the time of the hearing.

18. It is apparent that the FTT gave extensive reasons for rejecting the reliability and credibility of Mr Paudel's evidence at [217]-[237]. The FTT in its reasoning relied partly on inconsistencies between Mr Paudel's oral evidence and either his own written witness statement or contemporaneous documentary evidence. It also relied on Mr Paudel's failure to address contemporaneous documentary evidence in his oral evidence and his failure to be able to recall important relevant matters when asked.

19. While I accept that there was a significant time between the hearing of the Applicant's appeal and the FTT Decision its reasoning was not based on assessment of the oral evidence in isolation (memory and impressions of which might fade). It was not based on a general impression of his evidence or the manner in which he gave it but on the contents of that evidence.

20. There is no suggestion that the FTT did not accurately record the content Mr Paudel's oral evidence. Thereafter the FTT was not primarily relying on the plausibility (the likelihood of being true) of the witness's answers in oral evidence alone (or in comparison to oral evidence of other witnesses) but in comparison to indisputable or other and more contemporaneous documentary evidence. There is no suggestion that the inconsistencies or omissions in Mr Paudel's oral evidence relied upon by the FTT did not exist or that other innocent explanations or evidence he gave were not taken into account by the FTT.

21. Further, the FTT's findings and conclusions in this case – that the Applicant's conduct was deliberate - depended on a whole range of other (mainly contemporaneous) documentary material in this case in addition to the oral evidence of Mr Paudel. This was not primarily a case that turned on the recall of witnesses or a conflict of competing oral evidence between witnesses for the parties. I am not satisfied that the extent of the delay in this case rendered the FTT's findings regarding Mr Paudel to contain any arguable error of law: any hypothetical check between the reasoning the FTT relied upon and the impression that the witness made on the FTT at the time would not have made any material or meaningful difference to its findings which were rationally and sufficiently expressed.

22. I am not satisfied that this ground is arguable.

Second ground of appeal

The FTT's findings

23. The FTT made findings that the Applicant's conduct was deliberate in the context of the corporation tax appeal (see [310]-[313]) and VAT appeal (see [353]) as follows:

> 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.
> 311. In the words of HMRC, the appellant's record keeping arrangements were:
> "fundamentally inadequate and its business processes were not sufficiently robust to ensure that all income and associated expenses were brought into account in calculating its profits chargeable to corporation tax. That is not the behaviour of a prudent and reasonable taxpayer wishing to comply with their legislative requirements".
> 312. All of that is true but we would go further. 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 Radiosa off record. The stock flow exercise identifies significant volumes of off record sales and purchases.
> 313. They 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.
> ..
> 353. It is argued for the appellant that Mr Paudel believed that the records were correct and therefore the VAT returns would have been correct. We do not accept that for the reasons given in relation to Corporation Tax. We have explained at paragraphs 310 and 311 above why we thought that the behaviour was deliberate for Corporation Tax purposes and we adopt that reasoning for VAT. We find that the behaviour was deliberate but not concealed.
> [emphasis added]

24. The FTT rejected any need to find that the Applicant's behaviour was dishonest and accepted that HMRC did not plead, allege or put their case on the basis that the deliberate conduct was also dishonest. It did so in the following terms at [238]-[241] of the Decision:

> *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 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 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.

The Applicant's argument

25. Mr Bedenham, on behalf of the Applicant also seeks permission to appeal on the following ground: The FTT held that the Appellant had deliberately understated its tax liabilities (see paragraphs 309-313 and 353 of the FTT decision). However, the FTT erred in making that finding 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.

26. He submits that whether the Appellant behaved deliberately was relevant to:

a. whether some of the corporation tax assessments were made in time (see paragraph 321of the FTT decision).

b. whether the penalty was properly calculated on the "deliberate" basis.

c. whether some of the VAT assessments (which were dated 3 December 2018) were made in time (not referenced in the FTT decision but addressed at paragraph 60 of "part 2" of HMRC's Statement of Case1).

27. Mr Bedenham further contends that the FTT's holding at paragraph 241 that "deliberate behaviour is not necessarily…dishonest" is (at least arguably) inconsistent with the Supreme

Court's decision in *HMRC v Tooth* [2021] UKSC 17 where, when considering the meaning of "deliberate inaccuracy" in s118(7) of the Taxes Management Act 1970, the Supreme Court stated at [47]:

> "…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"

28. He relies on the Supreme Court's definition of dishonesty: A person is dishonest if, on the facts as known or genuinely believed by him/her/them, his/her/their actions would be regarded as dishonest by an ordinary, reasonable and honest person (see *Ivey v Genting Casinos* [2017] UKSC 67 at [74]).

29. Mr Bedenham argues that it is, at the very least, arguable that a finding that someone has acted with "an intention to mislead the Revenue" per *Tooth* is a finding of dishonesty per *Ivey* (or, put another way, a conclusion that the Appellant's behaviour was deliberate required a finding that the Appellant had behaved dishonestly) Therefore such a finding was not open to the FTT in circumstances where the same had not been advanced by HMRC (and none of the procedural safeguards required by allegations of dishonesty had been given).

30. He fairly accepted and drew to my attention to the direct authority against him which states that a deliberate inaccuracy does not require dishonesty: the Upper Tribunal's decision in *CF Booth Ltd v HMRC* [2022] UKUT 217 (TCC) where the UT stated at [41]:

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

31. Nonetheless Mr Bedenham submits that the decision in *CF Booth* is wrong, it did not consider *Ivey* when considering *Tooth* and the point should be revisited by the UT. At the very least, that position is arguable.

Determination

32. I grant permission on this ground on the basis it just passes the arguability threshold and holds a realistic prospect of success. On the substantive appeal the Applicant will need to persuade the UT that the decision in *CF Booth* (determined by an authoritative panel which the President of the UT Tax and Chancery Chamber chaired) was wrongly decided and that allegations of deliberate conduct in bringing about a loss of tax or deliberate inaccuracies in returns do indeed equate to allegations of dishonesty.

33. Nonetheless, at this stage the Applicant only need satisfy me that that decision in *CF Booth* is arguably wrong. In the circumstances in *CF Booth* where the Supreme Court's decision in *Tooth* was not considered by reference to that in *Ivey v Genting Casinos* (presumably because it was not brought to the UT's attention) the point is worthy of further argument.

34. Further I take into account that there is another compelling reason to revisit the issue. Mr Bedenham accepted that this ground, should it have ultimate merit, has serous ramifications

for a significant proportion of the appeals that the Tribunal hears and the way in which HMRC presents their cases in many appeals: all those in which the FTT considers allegations of deliberate conduct or inaccuracies on the part of a taxpayer.

35. Mr Bedenham accepts that the definition of deliberate in *Tooth* is in the context of a definition as to what constitutes deliberate inaccuracy in returns and only in relation to one specific provision – section 118(7) of the Taxes Management Act 1970. It is not necessarily presented as being a statement of more general application – see the discussion of the Supreme Court in *Tooth* at [37]-[47], particularly [39]. I pointed out to Mr Bedenham that the statutory context in which the threshold of 'deliberate' conduct or inaccuracies applies varies widely. This case is a good example – the word 'deliberate' appears in statutes in relation to deliberate conduct in bringing about a loss of tax in relation to discovery assessments and extending time limits in which to make assessments and in relation to statements made to the Revenue for example in penalties for deliberate inaccuracies. The word appears in different contexts for different taxes. The differing context and legislative history of each statute may be relevant to the understanding or construction of its meaning. The range of different contexts may be considered in this appeal.

Conclusion and right to reconsideration

36. Permission to appeal to the Upper Tribunal is **refused on Ground 1 but granted on Ground 2**.

Signed: **Date: 2 December 2024**
JUDGE RUPERT JONES
JUDGE OF THE UPPER TRIBUNAL