[2020] UKUT 0212 (TCC)

Appeal number: UT/2017/0040

VALUE ADDED TAX - procedure - personal liability notice - FA 2007, Sch 24, para 19 - application of Article 6 of the European Convention on Human Rights - appellant's application for a stay - whether HMRC's decision to proceed by way of civil penalty instead of a criminal prosecution an abuse of process - whether standard of proof should be the criminal standard - application to admit into evidence a prior tribunal decision

UPPER TRIBUNAL
TAX AND CHANCERY CHAMBER

LINDSAY HACKETT

Appellant

- and -

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

TRIBUNAL: Mr Justice Trower
Judge Timothy Herrington

Hearing conducted remotely by video conference deemed to be held in London on 8 June 2020

John M Burton QC and Peter Woodall, Counsel, of the Public Defender Service, for the Appellant

Jonathan Kinnear QC and Howard Watkinson, Counsel, instructed by the General Counsel and Solicitor to HM Revenue and Customs, for the Respondents

DECISION

Introduction

1. This is an appeal from the decision of the First-tier Tribunal ("FTT") (Judge Roger Berner) released on 23 November 2016. By that decision (the "Decision") the FTT made four case management decisions as follows:

(1) Not to stay the proceedings of the appeal of the appellant ("Mr Hackett") against the decision of the respondents ("HMRC") to give Mr Hackett a personal liability notice under paragraph 19 of Schedule 24 to the Finance Act 2007 ("FA 2007") in respect of a deliberate inaccuracy penalty imposed on a company of which Mr Hackett was the sole director. The FTT rejected Mr Hackett's contention that HMRC's decision to proceed against Mr Hackett in this way rather than prosecuting him in a criminal court was an abuse of the FTT's process.

(2) Not to stay the proceedings of Mr Hackett's appeal until he had obtained a representation order from the Legal Aid Agency.

(3) That the appropriate standard of proof in the appeal proceedings was the civil and not the criminal standard.

(4) That it would be an abuse of process for Mr Hackett to dispute in the present appeal facts and issues determined by the FTT in *Intekx Limited v HMRC* [2014] UKFTT 277 (TC) ("*Intekx 2014*"). Accordingly, the FTT directed that the FTT's decision in that appeal should be admitted as evidence in the proceedings relating to Mr Hackett's appeal.

2. On 17 March 2017 the Upper Tribunal (Judge Herrington) granted Mr Hackett permission to appeal against all but the first of those decisions. On 6 June 2017, following an oral hearing, Judge Herrington also granted Mr Hackett permission to appeal against the first of those decisions. The appeal against the second of those decisions is no longer pursued because Mr Hackett has now, after a lengthy delay, been granted legal aid in order to pursue his appeal in the FTT and this appeal.

Background

3. Mr Hackett's underlying appeal to the FTT concerns the decision of HMRC to notify Mr Hackett on 17 March 2015 of a personal liability notice in the sum of £12,833,984.49 under Paragraph 19 of Schedule 24 to FA 2007. Mr Hackett was, at all material times, the sole director of Intekx Limited ("Intekx"). Also on 17 March 2015, HMRC notified Intekx of a deliberate inaccuracy penalty assessment in the sum of £12,833,984.49 under section 97 of and Schedule 24 to FA 2007. HMRC contend that there were deliberate, and in some cases deliberate and concealed, inaccuracies in Intekx's VAT returns in respect of the VAT periods 07/09 to 07/13 inclusive, on the basis of which it was notified of the penalty assessment, and that these inaccuracies were wholly attributable to Mr Hackett as the sole director of the company. HMRC

therefore contend that Mr Hackett is liable to pay the full amount of the penalties as assessed against Intekx.

4. Intekx had previously appealed against HMRC's various decisions to deny it the right to deduct the input tax claimed in the VAT returns for the periods referred to at [3] above, the amount of which constituted the potential lost revenue against which the deliberate inaccuracy penalty of £12,833,984.49 assessed against Intekx was calculated. Intekx withdrew those appeals at the end of September 2014.

5. The essence of HMRC's case against Mr Hackett is that he knew that Intekx's transactions, on which the penalty amount is based, were connected with the fraudulent evasion of VAT.

6. HMRC had previously also denied Intekx the right to deduct input tax claimed in VAT period 09/06 in the sum of £176,487.50 incurred on two transactions on the basis that the transactions were connected with the fraudulent evasion of VAT and that Intekx knew, or should have known, of the same.

7. Intekx appealed to the FTT against that denial. During the FTT proceedings Intekx accepted that the two transactions were connected with the fraudulent evasion of VAT. The FTT also considered four other transactions entered into by Intekx in June and July 2006. In its decision, *Intekx 2014*, the FTT found that Intekx, through Mr Hackett, knew that the six transactions were connected with fraud and that the Appellant was complicit in the fraud: see [181] – [183] of *Intekx 2014*. None of the current penalties are based on those transactions, but HMRC seek to rely upon the findings of the FTT in the earlier Intekx litigation as probative of Mr Hackett's state of knowledge in relation to the transactions that underlie the penalty assessment which is the subject of the personal liability notice given to Mr Hackett and which is the subject of his own appeal to the FTT. HMRC also seek to rely in that regard on the evidence available in respect of the transactions in respect of which Intekx's right to deduct input tax was denied for the VAT periods 07/09 to 07/13.

Relevant legislation

8. Section 97 and Schedule 24 to FA 2007 introduced a new regime of penalties to be imposed on taxpayers in relation, among other things, to errors in documents provided to HMRC.

9. Paragraph 1 (1) of Schedule 24 provides that a penalty is payable by a person (P) where P gives HMRC a document of a specified kind which contains an inaccuracy which amounts to, or leads to, among other things, a false or inflated claim to repayment of tax. Among the specified documents are VAT returns and statements or declarations in connection with a claim in respect of VAT.

10. Paragraph 3 of Schedule 24 provides for three degrees of culpability in relation to inaccuracies. An inaccuracy is careless if it is due to failure by P to take reasonable care, deliberate but not concealed if the inaccuracy is deliberate on P's part but P does not make arrangements to conceal it and deliberate and concealed if the inaccuracy is deliberate on P's part and P makes arrangements to conceal it.

11. Paragraph 21 of Schedule 24 provides that a person is not liable to a penalty in respect of an inaccuracy or failure in respect of which the person has been convicted of an offence. However, there is no provision to the effect that if a penalty has been imposed on a person under these provisions he cannot be prosecuted for a criminal offence in respect of the same behaviour.

12. Paragraph 4 of Schedule 24 sets out the penalty payable. If the inaccuracy is deliberate but not concealed the penalty is 70% of the potential lost revenue and if the inaccuracy is both deliberate and concealed, the penalty is 100% of the potential lost revenue, with reductions for disclosure and the quality thereof (paras.9-10) and the ability to reduce such penalty for "special circumstances" (para.11 Sch.24).

13. Paragraphs 9 and 10 of Schedule 24 provide for reductions in the penalty for disclosure, the amount of reduction depending upon the quality of the disclosure.

14. "Potential lost revenue" in respect of an inaccuracy in a document which is attributable to a supply of false information is defined in Paragraph 5 of Schedule 24 as the additional amount due or payable in respect of tax as a result of correcting the inaccuracy or assessment.

15. Paragraph 13 of Schedule 24 deals with the procedure for assessment of penalties. In summary, HMRC are to assess the penalty and notify the person and the assessment is, except in relation to a matter specifically provided for in FA 2007, to be treated for procedural purposes in the same way as an assessment to tax and may be enforced in the same way.

16. Paragraphs 15 and 16 of Schedule 24 provide for the right and procedure to appeal against a decision that a penalty is payable and the quantum thereof. An appeal is to be treated, in general, in the same way as an appeal against an assessment to the tax concerned.

17. Paragraph 17 of Schedule 24 sets out the FTT's jurisdiction on an appeal against a penalty imposed pursuant to Schedule 24. The FTT may cancel or affirm HMRC's decision. On an appeal as to quantum the FTT may affirm HMRC's decision or substitute for HMRC's decision another decision that HMRC had the power to make.

18. Paragraph 19 of Schedule 24 provides that where a penalty is payable by a company for a deliberate inaccuracy which was attributable to an officer of the company, the officer is liable to pay such portion of the penalty (which may be 100%) as HMRC may specify by written notice to the officer, that notice being known as a personal liability notice. "Officer" includes a director of the company.

19. Paragraphs 13 (assessment procedure) and 15 to 17 (appeals) of Schedule 24 apply as if the officer had been assessed for the portion of the penalty specified in the personal liability notice.

The Decision

Abuse of process

20. Mr Hackett sought to stay the FTT proceedings on the basis that the decision by HMRC to proceed by way of personal liability notice under FA 2007 is an abuse of process, as it amounts to a decision to prosecute a criminal allegation of serious fraud in the tribunal and thus to deprive Mr Hackett of long-standing constitutional and statutory rights such as the right to trial by jury, the criminal standard of proof, the right to representation and the privilege against self-incrimination.

21. The FTT rejected that contention. Its reasoning was set out at [10] to [12] of the Decision follows:

> "10. The jurisdiction of the tribunal does not extend to judicial review of the decisions of HMRC to proceed by way of civil penalty. That HMRC have a choice in this regard has been clear since the debate on the establishment of a system of civil sanctions in VAT cases of fraud or negligent acts or omissions in the 1983 Keith Report, following which s 60 VATA was enacted. As Potter LJ noted in *Han and Yau*, at [45], the Keith Report stated (at p 411, para 18.4.50), in relation to the choice between civil penalties or criminal proceedings:
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> > "In our view the relative use of civil or criminal investigation techniques is a matter for Customs and Excise to regulate, weighing the competing calls on their resources, the nature of the frauds suspected and the extent to which criminal or civil investigation techniques are capable of turning up sufficient admissible evidence to satisfy the respective burdens of proof for criminal or civil proceedings. Whether investigators should switch from the civil to the criminal mode, or vice versa, in the course of an investigation, as may happen now in direct tax investigations, seems to us also essentially a matter for the Department, in the light of experience and the views and thoughts of Tribunals as to fairness to the accused in the circumstances of a particular case."
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> 11. Once that choice is made, the question of jurisdiction for any prosecution, on the one hand, or appeal against any assessment or notice, is established. It is beyond doubt that, in making such a choice between pursuing a criminal prosecution (the prosecuting authority for which would now be the Crown Prosecution Service), HMRC must act lawfully, and that the exercise by HMRC of their discretion in this matter would be susceptible to judicial review. But the tribunal does not have any judicial review jurisdiction.
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> 12. Nor would it be proper for the tribunal to exercise its case management powers to stay proceedings on the basis that HMRC's decision to proceed with a civil penalty was unreasonable. That would be tantamount to the assumption of a power of judicial review. I do not accept that, by assessing Intekx to a penalty for deliberate inaccuracy, or by issuing a personal liability notice to Mr Hackett, thereby resulting in an appeal being within this tribunal's jurisdiction, there has been any misuse of the tribunal's procedure, or that it will result in any manifest unfairness to Mr Hackett so as to amount to an abuse of process, or bring the administration of justice into disrepute (see *Hunter v Chief Constable of the West*

Midlands Police [1982] AC 529, per Lord Diplock at p 536C). It cannot be misuse of the tribunal's procedure to issue an assessment or notice merely on account of the fact that that the assessment or notice will give rise to an appeal to the tribunal, and not to proceedings in the criminal courts."

Standard of proof

22. The Applicant submitted before the FTT that given the serious nature of the allegation made concerning Mr Hackett, namely that he had been knowingly involved in fraud, the standard of proof according to which HMRC would have to prove their case should not be the civil standard of the balance of probabilities, but the criminal standard of beyond reasonable doubt. In support of that submission, the Applicant relied on a number of authorities where the court had held that although the proceedings were civil proceedings, the severity of the consequences meant that either the criminal standard of proof or an exacting standard practically indistinguishable from the criminal standard should be applied. Having reviewed those cases, the FTT concluded that the standard of proof applicable to these proceedings is the civil standard of the balance of probabilities. The FTT's reasoning was set out at [22] to [25] of the Decision as follows:

> "22. Those cases demonstrate that there can be cases, even those which are not classified as involving criminal proceedings either under domestic law or under the Convention, where either a heightened civil standard of proof, in some cases indistinguishable from the criminal standard, or the criminal standard itself, is appropriate. The stigma attached to being found to be a "sex offender", as having been involved in violence or disorder or being made subject to an ASBO, and the restraints on freedom which result from football banning orders or ASBOs, have all been found to merit such a heightened standard.
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> 23. The position of penalty appeals in the tribunal was considered by the Upper Tribunal in *Khawaja v Revenue and Customs Commissioners* [2014] STC 150. The Tribunal (Judge Herrington and myself) reviewed the authorities, both domestic and those of the European Court of Human Rights, and found, in the context of an appeal against a penalty under s 95(1)(a) of the Taxes Management Act 1970 ("TMA"), that the standard of proof was the civil standard of the balance of probabilities. That did not contravene the presumption of innocence in Article 6(2) of the Convention, as it did not deprive the presumption of innocence of its substance.
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> 24. The Upper Tribunal decision in *Khawaja* is binding on this tribunal. It concerned s 95(1)(a) TMA, under which the liability for a penalty for the delivery of an incorrect return could arise where a person acted fraudulently as well as negligently. There is nothing that could distinguish this case, even if the allegation is one of knowing involvement in fraud.
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> 25. The cases referred to by [Counsel for Mr Hackett] do not establish any general principle that can be applied to penalty cases in this tribunal. Indeed, those cases are examples of an exception to the general rule that, as Lord Hoffmann emphasised in *In re B* [2009] 1 AC 11, at [13], "the time has come to say, once and for all, that there is only one civil standard of proof and that is proof that the fact in issue more probably occurred than not". Nor is there any

> necessary connection between the seriousness of the allegation and inherent probability; see Lord Hoffmann in *In re B*, at [15], and Lady Hale, at [73]. Although, in applying the civil standard, inherent probabilities are something to be taken into account, where relevant, in determining where the truth lies, neither the seriousness of the allegation nor the seriousness of the consequences should make any difference to the standard of proof in determining the facts (*In re B*, per Lady Hale at [70]).”

Intekx 2014

23. At [40] and [41] of the Decision the FTT held that Mr Hackett, as the sole director of Intekx at the material time, had a sufficient degree of identification with Intekx to make it just to hold that the findings in Intekx 2014 should be binding in proceedings in respect of Mr Hackett’s appeal.

24. Accordingly, at [43] of the Decision the FTT decided that it would be an abuse of process for Mr Hackett to seek to re-litigate the relevant issues determined by the FTT in Intekx 2014.The FTT observed that in Intekx 2014 the FTT had considered all the facts and evidence including the evidence of Mr Hackett that related to HMRC’s decision to deny Intekkx the right to claim input tax in respect of the relevant transactions in VAT period 09/06. The FTT went on to say:

> “Mr Hackett, in his capacity as director of Intekx, has had an opportunity to put forward his case that in that period there was no connection between the transactions of Intekx in that period and fraudulent evasion of VAT, and that Intekx did not know of any such connection. It would be contrary to the principle of finality of litigation to allow that determination to be re-visited on this appeal. It would be a clear abuse of process to do so, and there are no circumstances that could justify such a course.”

25. At [47] of the Decision the FTT held that it followed from its conclusion at [43] of the Decision that there can be no dispute as to the facts and issues that were determined by the FTT in Intekx 2014 and that, in relation to VAT period 09/06, the decision of the FTT in that appeal is admissible as evidence in Mr Hackett’s appeal. The FTT’s reasoning was set out at [49] as follows:

> “I am satisfied that the decision of the tribunal in *Intekx* 2014 is relevant. This is a case where, although questions of input tax recovery are necessarily viewed by reference to individual accounting periods, transactions must be examined not in isolation but having regard to their attendant circumstances and context, the relevance of "similar fact" evidence and the fact that the tribunal, in examining the state of knowledge of the company and Mr Hackett, is entitled to look at the totality of the deals effected by Intekx, and their characteristics (see the judgment of Christopher Clark J in *Red 12 Trading Ltd v Revenue and Customs Commissioners* [2010] STC 589, at [109] - [111]). It will be for the tribunal that hears Mr Hackett's appeal to determine what weight, if any, is to be accorded to the *Intekx* 2014 decision outside the confines of its own facts and circumstances. It cannot, however, in the circumstances of this appeal, be regarded as irrelevant, nor have I been able to identify any compelling reason why the decision should not be admitted.”

Issues to be determined

26. The question we have to determine on this appeal is whether the FTT made any error of law in reaching any of the following conclusions:

(1) That it was not an abuse of the FTT's process to proceed against Mr Hackett by means of a personal liability notice under paragraph 19 of Schedule 24 2 FA 2007 rather than prosecuting him in a criminal court (the "Abuse of Process Issue").

(2) That the appropriate standard of proof in the proceedings on Mr Hackett's appeal against the personal liability notice is the civil and not the criminal standard (the "Standard of Proof Issue").

(3) That the FTT's decision in Intekx 2014 should be admitted as evidence in the proceedings relating to Mr Hackett's appeal (the "Intekx 2014 Issue").

Discussion

The Abuse of Process Issue

Background

27. As Potter LJ observed in the Court of Appeal's judgment in *Han & Yau and others v CEE* [2001] 1 WLR 2253 (*"Han & Yau"*) in the passage quoted in the Decision and set out at [21] above, a system of civil sanctions was established in VAT cases of fraud or negligent acts or omissions following the recommendations of the 1983 Keith Report.

28. In particular, s 60 of the Value Added Tax Act 1994 ("VATA) was enacted following the Keith Report. In essence, s 60 VATA provided that where, for the purpose of evading VAT, a person did any act or omitted to take any action and his conduct involved dishonesty (whether or not the conduct gave rise to criminal liability) he would be liable to a penalty equal to the amount of VAT evaded or sought to be evaded. That provision has now been repealed following the enactment of the successor penalty regime contained in Schedule 24 FA 2007.

29. In addition, Section 72 VATA, which is still in force, has created specific criminal offences in respect of the evasion of VAT. In essence it provides that if any person is knowingly concerned in, or in the taking of steps with a view to, the fraudulent evasion of VAT by him or any other person he is liable on conviction to maximum penalties of an unlimited fine or imprisonment for a term not exceeding 7 years or both.

30. In *Han & Yau* Potter LJ quoted a number of passages from the Keith Report which explained the rationale for the introduction of civil penalties in relation to the VAT regime.

31. At [40] Potter LJ quoted the following passage from paragraph 18.3.7 of the Keith Report:

> "Turning to the question of the introduction of penalties for civil fraud, to run in parallel with the bringing and compounding of criminal proceedings, Customs and Excise told us that to run the two systems together would undoubtedly give much greater flexibility in dealing with fraud or near fraud. It would afford welcome assistance in dealing with those cases where there were indications of fraud but where it was not possible to obtain proof to the criminal standard…. The proposal should therefore help the department to deploy their resources effectively in the light of changing circumstances…."

32. As set out in the passage from 18.4.50 from the Keith Report, set out at [21] above, the authors of that report expressed the view that the relative use of civil or criminal investigation techniques was a matter for Customs and Excise to regulate and whether or not to switch from the civil to the criminal mode or vice versa in the course of an investigation was also essentially a matter for that body in the light of experience, taking account of the views of courts and tribunals as to fairness to the accused in the circumstances of any particular case.

33. At [43] Potter LJ referred to paragraph 18.4.16 of the Keith Report which drew a comparison between the then existing position as regards VAT which, because of the entirely criminal character of the VAT offence code, required all VAT cases to be investigated and reported to the criminal standard, with the direct tax penalty regime which provided for civil penalties for fraud "with the burden of criminal investigation being taken up only in those cases identified from the outset or in their course as sufficiently heinous to justify a prosecution." There was a further observation in that paragraph to the effect that there had been no consistent body of criticism of the lower civil burden of proof in civil penalty cases as being unfair to the taxpayer.

34. In *Han & Yau* the Court of Appeal held that proceedings under s 60 VATA constitute a "criminal charge" for the purposes of Article 6 of the European Convention on Human Rights ("Article 6"). The Court came to that conclusion on the basis that s 60 made provision for the imposition of substantial penalties for fraud/dishonesty and the purpose of the penalties was punitive and deterrent: see [76] and [78] of the judgment of Potter LJ. As a consequence, a person subject to such proceedings has the protection of the right to a fair trial and other rights which include a right to silence, a privilege against self-incrimination, a presumption of innocence and, if he does not have sufficient means to pay for it himself, the right to free legal assistance when the interests of justice so require.

35. It is well established that the Strasbourg case law makes clear that the concept of a "criminal charge" under Article 6 has an "autonomous" Convention meaning and does not mean that the proceedings are criminal for domestic law purposes, in contrast to proceedings taken, for instance, under s 72 VATA. As a consequence, and we return to this point when considering the Standard of Proof Issue, the criminal standard of proof (that is the requirement to prove matters beyond reasonable doubt) may not apply and neither will there be a right to trial by jury. Furthermore, there are stricter rules on evidence which apply in criminal proceedings. That would, as Mr

Burton QC, who appeared for Mr Hackett, submitted means that the decision in *Intekx* 2014 would be unlikely to be admissible if the proceedings against Mr Hackett were criminal for domestic law purposes.

36. It was common ground in this case that proceedings under Schedule 24 for a deliberate inaccuracy penalty likewise constitute a "criminal charge" for Article 6 purposes, even though there is no explicit requirement to prove fraud or dishonesty. As a consequence, following the Decision, Mr Hackett, after a long dispute with the Legal Aid Agency, has been able to secure legal aid for his appeal. He has been successful in doing so because Regulation 9 (v) of the Criminal Legal Aid (General) Regulations 2013 provides that criminal proceedings in respect of which legal aid is available includes any proceedings before any court or tribunal that involve the determination of a criminal charge for the purposes of Article 6.

Abuse of process in the FTT

37. It was also common ground in this case that in appropriate cases the FTT does have jurisdiction to provide protection against abuse of its processes by use of its case management powers. In an appropriate case, applying the overriding objective of Rule 2 (2) of The Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009 (the "Rules") to deal with cases fairly and justly, the FTT can exercise its case management powers under Rule 5 of the Rules to prevent an abuse of process by directing a stay of proceedings. As Mr Burton submitted, the FTT will be entitled to make such a case management decision when it is "just, fair and proportionate" to do so: see on this point *Atlantic Electronics Limited v HMRC* [2013] EWCA Civ 651 at [9] and [43] per Ryder LJ.

38. However, the jurisdiction of the FTT is limited to situations where the events complained of have implications for a fair hearing of a tax appeal. In those circumstances, the FTT can use whatever powers it has to ensure so far as possible that the procedures adopted for the hearing of the tax appeal are fair. That appears from [27] of the decision of Morgan J sitting in the Upper Tribunal in *Foulser v HMRC* [2013] UKUT 038 (TCC). Morgan J went on to say that the phrase "abuse of process" has been used to describe two different things which he explained at [35] as follows:

> "…I consider that for the purpose of determining the jurisdiction of the FTT to deal with arguments as to abuse of process, cases of alleged abuse of process can be divided into two broad categories. The first category is where the alleged abuse directly affects the fairness of the hearing before the FTT. The second category is where, for some reason not directly affecting the fairness of such a hearing, it is unlawful in public law for a party to the proceedings before the FTT to ask the FTT to determine the matter which is otherwise before it. In the first of these categories, the FTT will have power to determine any dispute as to the existence of an abuse of process and can exercise its express powers (and any implied powers) to make orders designed to eliminate any unfairness attributable to the abuse of process. In the second category, the subject matter of the alleged abuse of process is outside the substantive jurisdiction of the FTT. The FTT does not have a judicial review jurisdiction to determine whether a public authority is

> abusing its powers in public law. It cannot make an order of prohibition against a public authority."

39. It was common ground in this case that Mr Hackett would have to satisfy us that his allegations that HMRC's decision to proceed against him by way of civil penalty proceedings rather than criminal proceedings was an abuse of process within the first of the categories identified by Morgan J in *Foulser*. Mr Burton QC accepted that if the basis of Mr Hackett's complaint was simply that HMRC were wrong to exercise their discretion to proceed by way of civil penalty proceedings then such a complaint fell outside the scope of the FTT's jurisdiction and would have to have been addressed through the medium of judicial review proceedings in the Administrative Court.

40. We were referred to an example where the FTT applied the principles laid down by Morgan J in *Foulser*. In *Always Sheet Metal Limited and others v HMRC* [2017] UKFTT 0198 (TC) (*"Always Sheet Metal")* the FTT (Judge Richards) considered whether, as a result of what the taxpayer considered to be HMRCs excessive delay, it was an abuse of process for HMRC to have made the assessments against the taxpayer which were the subject of the appeal in that case. The taxpayer contended that HMRC's delay in making the assessments meant that the FTT would not be able to deal with the appeal fairly and justly.

41. At [101] the FTT, relying on *Foulser*, held that it did have jurisdiction to consider whether it was possible to deal with the taxpayer's appeal fairly and justly and, if it could not, to make appropriate directions. It appears to be implicit in that finding that the FTT was of the view that the taxpayer's complaint fell within the first category of cases referred to by Morgan J in *Foulser*.

42. At [106] the FTT confirmed that it had case management powers to regulate the conduct of litigation before it. However, it declined to exercise its case management powers in this case. Its reasoning was as follows:

> "[Counsel for the taxpayer] is not making any complaint as to how HMRC have conducted the litigation from the point at which the appellants notified their appeals to the Tribunal. He is, therefore asking the Tribunal to punish HMRC for what the appellants considered to be unacceptable delay before Tribunal proceedings were commenced. I do not consider that would be a proper exercise of case management powers… [*Foulser*] dealt with a situation where HMRC were argued to have taken certain prejudicial actions while proceedings before the Tribunal were current…"

43. Although the FTT did not say so explicitly, in our view the decision of the FTT not to exercise its powers in that case could also be justified on the basis that the complaint against HMRC in effect amounted to a complaint as to how it had exercised its investigatory and decision-making powers, in other words an allegation that HMRC had abused its power to make an assessment, a matter which fell outside the scope of the jurisdiction of the FTT and which had to be addressed through judicial review proceedings.

Application of the principles to this case

44. It is clear that for Mr Hackett to succeed on the Abuse of Process Issue he needs to satisfy us that (i) the abuse of process complained of falls within the first category identified by Morgan J in *Foulser* and (ii) that it would be just, fair and proportionate in the circumstances of the case to stay the proceedings in the FTT in order that HMRC can consider whether the matter should be referred to the Crown Prosecution Service with a view to prosecution. As Mr Kinnear QC, who appeared before us for HMRC in this case, observed, the decision as to whether or not to take criminal proceedings in any particular case involving tax offences is no longer taken by HMRC themselves.

45. Mr Burton's submissions can be summarised as follows:

(1) By proceeding under the civil penalty route HMRC have deprived Mr Hackett of the protection afforded in criminal cases and this thereby seriously affects the fairness of the proceedings in the FTT which can only be remedied by a stay.

(2) In particular, by proceeding in this matter Mr Hackett would be deprived of the protection of the criminal standard of proof (if the Standard of Proof Issue is decided against him) and the decision in *Intekx* 2014 would be admissible in the FTT proceedings (if the *Intekx* 2014 Issue is decided against him) which would not be the case in any criminal proceedings.

(3) The case is distinguished by a number of characteristics which are unusual, namely the peculiar gravity of the allegation, an allegedly extremely high scale organised £12 million plus VAT fraud and the sheer size of the penalty sought from Mr Hackett. The case amounts to a serious allegation of fraud falling within the category of cases identified in the Keith Report as sufficiently heinous to justify a prosecution.

(4) The current decision not to prosecute such a matter is, prima facie irrational and the fact that the decision may also be capable of judicial review does not mean that the Tribunal cannot also exercise its case management powers. The last sentence in the passage from the Keith Report set out at [21] above makes it clear that the decision of HMRC to proceed through the civil penalty route is subject to the views of the FTT as to fairness to the accused in the circumstances of a particular case.

46. None of Mr Burton's submissions persuade us that the abuse of process argument run by Mr Hackett directly affects the fairness of the hearing before the FTT. However skilfully Mr Burton sought to frame his arguments otherwise, his submissions in essence amount to a contention that HMRC acted unlawfully in exercising its discretion to bring civil penalty proceedings in this case. That contention falls squarely within the second category of case identified by Morgan J in *Foulser*. As was the position in *Always Sheet Metal*, the matters complained of in this case occurred before the proceedings were instituted in the FTT and do not relate to any alleged abuse of the FTT's own proceedings.

47. In our view the statement in the Keith Report as to the views of the tribunals as to the fairness of civil penalty proceedings in that forum does no more than recognise that in any particular appeal relating to a civil penalty the FTT will have to consider how the proceedings are to be conducted in a manner which is fair, just and proportionate. The FTT will need to consider that question when, for example, exercising its powers to order disclosure or admit relevant evidence.

48. In our view, the passage from the Keith Report relied on by Mr Burton does not support the proposition that it was intended that the FTT should have the power to determine whether civil penalty proceedings should have been brought in the first place. In our view, the passage makes it absolutely clear that is entirely a matter for HMRC to decide, with that decision being amenable to judicial review in appropriate cases. This is reinforced by the statutory scheme for civil penalties set out in Schedule 24 FA 2007, and in particular paragraph 21 of Schedule 24 which recognises that the civil and criminal powers operate in parallel and makes provision to avoid double jeopardy where criminal proceedings have already been taken which have resulted in a conviction. It was clearly open to Parliament to go further and prescribe the circumstances in which civil penalty proceedings were inappropriate, for example in cases of serious fraud, but it has declined to do so. Consequently, we see no basis on which it could be said that the FTT itself could develop principles on which such decisions could be made.

49. Mr Hackett does not assert that he cannot have a fair trial in the FTT on proceedings for a civil penalty. Rather, as submitted by Mr Kinnear, he asserts that he should not be tried at all because of HMRC's conduct prior to commencement of the proceedings in deciding to seek to impose a civil penalty rather than refer the matter for prosecution.

50. The effect of HMRC's decision is that some of the particular protections afforded to defendants in criminal proceedings will not be available but that situation is balanced by the loss of the possibility that would arise in criminal proceedings of a lengthy sentence of imprisonment and a criminal record, possibly for criminal conspiracy to cheat the Revenue or for being knowingly concerned in VAT fraud following prosecution under s 72 VATA. Although Mr Burton submitted that it was an unusual situation for a taxpayer to be pursued in civil proceedings for a very substantial civil penalty in relation to a serious fraud, it appears to us very unusual for a potential defendant to argue that he would prefer to be subject to criminal rather than civil proceedings.

51. For the reasons set out above, we conclude that the FTT has no jurisdiction to consider under its case management powers whether the decision by HMRC to proceed in this case by way of civil penalty proceedings is an abuse of process. That is sufficient to determine the Abuse of Process Issue in favour of HMRC, but we will deal briefly with Mr Hackett's submissions that, assuming the FTT had jurisdiction to do so, it would be just, fair and proportionate in the circumstances of the case to stay the proceedings in the FTT.

52. In our view, none of Mr Burton's submissions provide a proper basis for the FTT to make a principled decision to stay the proceedings. In effect, Mr Burton's submissions amount to no more than a contention that the fact of a potential large penalty involving alleged participation in a substantial VAT fraud inevitably means that the only appropriate course is to refer the matter for criminal prosecution.

53. That approach gives no indication as to where the dividing line would lie between those matters which were appropriate for criminal prosecution and those which were appropriate for civil penalty proceedings, either in respect of how large the penalty needs to be before the line is crossed or how extensive the involvement of the taxpayer in the fraud needs to be.

54. In respect of the alleged involvement of Mr Hackett in the alleged fraud, it is important to note that a penalty might be justified on the basis of the facts alleged against Mr Hackett in circumstances in which those same facts might not be sufficient to establish the commission of a criminal offence. Thus, paragraph 5 of HMRC's statement of case in Mr Hackett's appeal states that the potential lost revenue against which the penalty and personal liability notice amount were calculated stems from Intekx's "knowing involvement" in MTIC fraud transaction chains during the relevant VAT periods. The allegation is that Intekx claimed input tax on purchases that "it knew were connected with the fraudulent evasion of VAT." There is no allegation that Intekx, through Mr Hackett, was actually a co-conspirator in the transactions it entered into. At paragraph 12 of the statement of case, HMRC seek to prove that the inaccuracies in Intekx's relevant returns amounted to, or led to, a false or inflated claim to repayment of tax, that those inaccuracies were deliberate and that the inaccuracies were attributable to Mr Hackett as an officer of Intekx.

55. There is therefore no pleaded allegation of dishonesty or fraud against Mr Hackett. This is reinforced by paragraph 20 of the statement of case which states that Intekx was denied the right to deduct the relevant input VAT on the basis that Intekx knew, or should have known, that those transactions were connected with the fraudulent evasion of VAT. At paragraph 35 of statement of case, HMRC assert that Intekx's relevant VAT returns were deliberately inaccurate because, in respect of each return, Intekx reclaimed input tax that it knew it was not entitled to, because each of the wholesale transactions in which it claimed that input tax was connected with the fraudulent evasion of VAT and Mr Hackett knew that. At paragraph 38 of the statement of case HMRC plead that claiming input tax that a taxable person knows is not due because it knows that the relevant transactions are connected with the fraudulent evasion of VAT, is deliberate behaviour. Again, there are no pleaded allegations of dishonesty or fraud against either Intekx or Mr Hackett.

56. As Mr Kinnear submitted, in *E Buyer Limited & Citibank NA v HMRC* [2018] 1 WLR 1524 the Court of Appeal held that allegations that a taxpayer knew or should have known that his transactions were connected with fraud did not necessarily involve an allegation of dishonesty but simply of knowledge. Consequently, there was no requirement for HMRC to plead dishonesty against the taxpayer in order to be allowed to allege that taxpayer knew that its transactions (a) were contrived, (b)

facilitated fraud by others, or (c) were connected to fraud: see [75] to [79] of the judgment of Sir Geoffrey Vos C.

57. It does not therefore appear that the allegations against Mr Hackett as set out in HMRC's statement of case are sufficient in themselves to amount to allegations either that he had the necessary dishonest intent to commit a criminal offence such as a conspiracy to cheat the Revenue, or that the extent of his alleged involvement in the fraud was sufficient to form the basis of a prosecution under s72 VATA on the basis that he was "knowingly concerned" in the fraudulent evasion of VAT by the participants in the fraud. Therefore, whether or not there was sufficient evidence on which to base a criminal prosecution is a matter which would require further investigation and was not a decision that the FTT could have made on the basis of the material before it in this case.

58. We therefore determine the Abuse of Process Issue in favour of HMRC.

The Standard of Proof Issue

The authorities

59. Our starting point is that there are but two standards of proof – the civil and criminal. The House of Lords made that clear in *In re B (Children) (FC)* [2008] UKHL 35 where Lord Hoffmann, having observed at [4] that in care cases the relevant tribunal must apply the ordinary civil standard of proof, that is it must be satisfied that the occurrence of the fact in question was more likely than not, went on to say at [5]:

> "Some confusion has however been caused by dicta which suggest that the standard of proof may vary with the gravity of the misconduct alleged or even the seriousness of the consequences for the person concerned. The cases in which such statements have been made fall into three categories. First, there are cases in which the court has for one purpose classified the proceedings as civil (for example, for the purposes of article 6 of the European Convention) but nevertheless thought that, because of the serious consequences of the proceedings, the criminal standard of proof or something like it should be applied. Secondly, there are cases in which it has been observed that when some event is inherently improbable, strong evidence may be needed to persuade a tribunal that it more probably happened than not. Thirdly, there are cases in which judges are simply confused about whether they are talking about the standard of proof or about the role of inherent probabilities in deciding whether the burden of proving a fact to a given standard has been discharged."

60. Lord Hoffmann then went on to refer at [6] to [9] to a number of cases within the first of the three categories he had identified where although the proceedings were civil, a standard of proof should be applied which for all practical purposes was indistinguishable from the criminal standard. Among those cases was *B v Chief Constable of Avon and Somerset Constabulary* [2001] 1 WLR 340, which concerned a "sex offender order" under section 2 of the Crime and Disorder Act 1998. Such an order can be made if it is proved that a person is a sex offender and has acted in such a way as to give reasonable cause to believe that an order is necessary to protect the

public from serious harm. Because of the seriousness of the consequences of such an order, which imposes restrictions upon a person's freedom of movement and activity it was held that the magistrates court should apply a civil standard of proof which for all practical purposes was indistinguishable from the criminal standard.

61. Another case to which Lord Hoffmann referred was *R (McCann) v Crown Court at Manchester* [2003] 1 AC 787 which concerned an anti-social behaviour order under s 1 of the 1998 Act. The House of Lords held that although the proceedings were civil for the purposes of Article 6 the criminal standard of proof should be applied because of the seriousness of the matters involved, again involving restriction on liberty.

62. Lord Hoffmann then concluded at [13]:

> "… I think that the time has come to say, once and for all, that there is only one civil standard of proof and that is proof that the fact in issue more probably occurred than not. I do not intend to disapprove any of the cases in what I have called the first category, but I agree with the observation of Lord Steyn in *McCann's* case (at 812) that clarity would be greatly enhanced if the court said simply that although the proceedings were civil, the nature of the particular issue involved made it appropriate to apply the criminal standard."

63. That passage makes it clear that in cases that fell within Lord Hoffmann's second and third categories, the civil standard of proof of the balance of probabilities was to be applied.

64. The question therefore arises as to what other type of case falls within the first category of cases identified by Lord Hoffmann, that is where the proceedings are so serious that although the proceedings concerned were civil proceedings it was appropriate to apply the criminal standard.

65. In *HMRC v Khawaja* [2008] EWHC 1687 (Ch) 2008 Mann J, sitting in the High Court, carried out a detailed review of the authorities relevant to the question of the standard of proof to be applied in civil penalty proceedings in the tax context. That was a case involving civil penalties imposed under s 95 (1) (a) of the Taxes Management Act 1970 for negligently submitting incorrect self-assessment income tax returns. HMRC had appealed to the High Court against the General Commissioners' determination that the criminal standard of proof beyond reasonable doubt should be applied.

66. Mann J referred to *Re B* and Lord Hoffmann's first category of cases and directed himself at [12] that it was necessary for him to decide whether an appeal to the General Commissioners in relation to income tax penalty proceedings falls into that category.

67. At [14] Mann J found that the proceedings in the case before him were undoubtedly civil as opposed to criminal. He observed that the proceedings were in complete distinction to parallel criminal proceedings which can be brought for fraudulent tax evasion, and they cover ground (negligence) which could never sensibly be the subject of criminal proceedings in cases such as this. His starting point

therefore was of a presumed civil standard of proof. However, he went on to say at [15]:

> "However, as the cases above indicate, that is but a starting point. There are cases in which the consequences are so serious, or the nature of the claim as such, that the imposition of a criminal standard of proof is required. There is no binding authority directly on point in relation to income tax penalties, but there are pointers elsewhere in the authorities."

68. Mann J observed that in *1st Indian Cavalry Club Limited v CEE* [1998] STC 294 the Inner House of the Court of Session had held that in proceedings for a dishonest VAT evasion penalty under s 60 VATA, which, as we have observed above has been replaced by the provisions of Schedule 24 FA 2007 regarding deliberate inaccuracy penalties, the civil standard applied. As Mann J observed, the judges in that case found that there were pointers in the VAT legislation itself, which did not exist in the Taxes Management Act, which pointed away from the criminal standard and towards the civil standard, notably the statement that proceedings could be brought under the section whether or not the conduct concerned was such as to give rise to criminal liability.

69. However, Mann J placed much reliance on the Keith Report, and in particular Potter LJ's observations on Paragraph 18.4.16 of the Report in *Han & Yau*, as summarised at [33] above. That is where Potter LJ contrasted the position as regards VAT at the time of the Report to the position in relation to income tax where the "Inland Revenue offence code" allowed a "civil" form of investigation and settlement and commented that there had been no consistent body of criticism "of the lower civil burden of proof in such cases as being unfair to the taxpayer."

70. Those considerations led Mann J to the conclusion that the civil standard of proof applies to the system of VAT penalties. He said this at [25]:

> "What one therefore gets out of these VAT cases is as follows. First, their tenor is that the civil standard of proof applies to the system of VAT penalties. It is true that the statutory context is different, and that additional arguments can be made on the wording of the VAT statutes than are available in relation to the income tax regime. However, I do not think that that makes a material difference. The apparent intention of the legislature was to provide something within the VAT regime which was parallel to the income tax regime. In that context, it was plainly assumed that the civil standard of proof applied to the income tax regime, and the VAT scheme was mimicking that. This is notwithstanding the fact that the VAT regime is confined to fraud, and negligence is not sufficient. If the civil standard applies in relation to civil fraud so far as VAT is concerned, then there is no reason in principle why it should not apply to such matters in relation to income tax (note the word "fraudulently" in s.95), and negligence is then an a fortiori case. Mr Hirst urged on me that the factual context of the VAT legislation was different from that in relation to income tax. He said that in relation to VAT there was wide scale evasion. He invited me to find that that was the case, or to take judicial notice of it, and somehow to take judicial notice of the fact that there was less of a problem in relation to income tax. I am afraid I decline to do so. I am sure that whatever the numbers might be in relation to the

> two taxes, the stamping out of evasion in both is equally desirable. It is apparent that parallel regimes have been put into place, albeit with different wording, in the various statutes, and it seems to me to be sensible that the same standard of proof should apply. For the reasons given in the Keith Report and referred to in the cases, that standard should be the civil standard."

71. Although these remarks are strictly *obiter* as Mann J was dealing with a case of negligence in the context of the income tax regime, he found that the civil standard of proof applied to the whole of the VAT penalty regime, and notwithstanding the fact that he described it as a regime which applied to "civil fraud" and which, at the time in relation to proceedings under s 60 VATA, required HMRC to prove dishonesty. It is clear therefore that Mann J did not consider that any cases under the VAT regime fell within Lord Hoffmann's first category of cases.

72. Mann J went on to decide that the position had not been changed by the application of Article 6. He said at [28] that, although HMRC had accepted that the penalty proceedings were criminal proceedings for the purposes of Article 6 and certain specific procedural safeguards would therefore apply, the standard of proof was not dealt with by Article 6.

73. Mann J remitted the case to the General Commissioners in order to determine the matter applying the correct standard of proof. When the case came to be heard, the General Commissioners had been replaced by the FTT who upheld the decision to impose a penalty on the taxpayer. That decision was the subject of an appeal to the Upper Tribunal which, in a decision which can be found at [2013] UKUT 0353 (TCC), considered the question of the standard of proof again, recognising that it was not strictly bound by the decision of Mann J.

74. The Upper Tribunal rejected the taxpayer's appeal, rejecting the submission that the High Court's decision was wrongly decided. The Upper Tribunal also rejected further arguments based on the submission that Article 6 required the criminal standard to be applied, holding at [39] that the application of the civil standard to penalty proceedings of the nature at issue in the appeal was in accordance with domestic law. That issue is not disputed on this appeal.

75. A recent case which considered the type of case that could fall within Lord Hoffmann's first category is *Hannam v The Financial Conduct Authority* [2014] UKUT 0233 (TCC). In that case the Upper Tribunal had to consider whether allegations that a person had engaged in market abuse by improperly disclosing price sensitive inside information, a matter which fell within the prohibition contained in s 118(3) of the Financial Services and Markets Act 2000 and which, if proved, could result in an unlimited civil financial penalty being imposed, were so serious that the criminal standard of proof should be applied. The Tribunal observed at [152] that a finding of market abuse against Mr Hannam, a leading figure in the investment banking industry, had very serious consequences for him, and that the penalty of £450,000 which the Authority sought to impose on Mr Hannam was an example of a serious consequence.

76. The Tribunal referred at [154] to Lord Hoffmann's recognition that there were some civil proceedings where the criminal standard is applied because of the serious consequences of the proceedings. In addition to the cases referred to by Lord Hoffmann the Tribunal referred at [159] to *Gough v Chief Constable of Derbyshire* [2002] QB 1213 where the Tribunal observed that the case involved a deprivation of fundamental liberties in that the order restricted the respondents' freedom of movement by prohibiting them from attending certain football matches or coming within a specified area of the ground by requiring them to surrender their passports to prevent them from travelling to matches abroad.

77. At [180] the Tribunal held that the cases which Lord Hoffmann used to illustrate the exceptional nature of the case required before the criminal standard is adopted were not exhaustive of the type of case which is covered. The Tribunal also held that deprivation of fundamental liberties is not a necessary ingredient, drawing support from a number of disciplinary cases involving solicitors and other professionals where the criminal standard was applied. However, the Tribunal observed at [181] that it does not follow that in all cases where an allegation is serious and has serious consequences for an individual that the allegation must be proved on the criminal standard. In some cases it will, in others it will not.

78. The Tribunal concluded that market abuse did not fall within Lord Hoffmann's first category. It said at [191]:

> "Drawing all of this together, we do not consider that market abuse falls within Lord Hoffmann's first category. We have already explained that we do not perceive allegations of market abuse as tantamount to allegations which constitute criminal offences. Although the consequence in the case of serious market abuse may be a large financial penalty, there is no other sanction (apart from censure) which the Authority can impose under the market abuse regime (in contrast with the sanctions it can impose on an approved person whom it considers is not "fit and proper": see sections 63 and 66 FSMA). In the light of that, a person against whom allegations of market abuse are raised is not, it seems to us, entitled to the same sort of protection as a person whose fundamental liberties are at risk, any more than a person whose livelihood is at risk is entitled to such protection…Further, it seems to us that if an analogy with another area is to be found, the closest analogy is a case of civil fraud falling in Lord Hoffmann's second category, such as Hornal v Neuberger Products Ltd, where the ordinary civil standard applies but where the inherent probability of the relevant event (eg the activities amounting to market abuse) may lead to the need for strong evidence to persuade the tribunal that the event occurred."

79. We note in particular the observation of the Tribunal set out above to the effect that the fact that a substantial financial penalty may result does not in itself amount to serious consequences which would justify the case falling within Lord Hoffmann's first category where the fundamental liberties of the person concerned are not at risk. In our view that observation and the analogy that the Tribunal drew with civil fraud are particularly relevant in this case. We have noted above that Mann J drew the same analogy between civil fraud and the then VAT penalty regime in *Khawaja*.

Application of the principles in this case

80. In our view the authorities which we have reviewed above demonstrate that the normal civil standard of proof of the balance of probabilities should apply to the proceedings in this case unless Mr Hackett satisfies us that this case is one that falls within the first category of cases identified by Lord Hoffmann in *Re B,* that is because of the serious consequences of the proceedings, the criminal standard of proof or something like it should be applied.

81. Indeed, Mr Burton's submissions on this issue were directed entirely at this point. He submits that the gravity and consequences of the penalty in this appeal so far exceeds the fact pattern in the cases reviewed in *Re B* and the other authorities referred to above that a standard of proof indistinguishable from the criminal standard is merited.

82. Mr Burton seeks to distinguish *Khawaja* on the following basis. He submits that that the case concerned a penalty notice for negligently submitting incorrect returns regarding the taxpayer's personal tax position, the sums involved did not compare whatsoever to the instant appeal and Mann J had decided the case the way he did because there were pointers in the VAT legislation at that time that suggested the civil standard of proof applied in all VAT cases. Mr Burton also submits that Mann J determined that the proceedings were civil proceedings because they covered negligence which could never sensibly be the subject of criminal proceedings in cases such as the one that he was faced with.

83. Mr Burton submits that in a case such as this, involving serious MTIC fraud, the size of the penalty and the stigma that would attach to Mr Hackett if the case were proved meant that, in the words of the Keith Report, it was sufficiently heinous to have justified prosecution which was sufficient to put it into Lord Hoffmann's first category of cases. He submits that there is no difficulty in knowing where to draw the line between this case and any other penalty case where it would be appropriate to apply the civil standard of proof because this case was so clearly over the line.

84. We cannot agree with these submissions for three principal reasons. First, in our view the weight of authority demonstrates that the factors put forward by Mr Burton are not sufficient to establish that a case of this kind should fall within the first category of cases identified by Lord Hoffmann. Second, the wording of the legislation in Schedule 24 FA 2007 setting out the framework for the civil penalty regime, which applies to both direct and indirect tax, points to a single coherent regime that does not seek to distinguish how the different levels of alleged culpability are to be dealt with in procedural or evidential terms. Thirdly, the criteria that Mr Burton identifies as establishing that the application of the criminal standard is appropriate are unprincipled and unworkable in practice.

85. As far as the first reason is concerned, in our view the reasoning of Mann J in *Khawaja*, based on the authorities regarding dishonest evasion penalties under the previous VAT penalty regime and his findings as to the intention of the legislation as reflected in the Keith Report, is equally applicable in this case. In *Khawaja* Mann J applied those principles, derived from cases where dishonesty had to be proved, to a case involving negligent behaviour. We therefore reject Mr Burton's submission that

the case can be distinguished on the basis that it involved a lesser standard of culpability. Mann J clearly had in mind that, as identified by Lord Hoffmann, there were cases where it was appropriate for a heightened standard of proof to be applied. It is, however, clear to us that based on his analogy with cases of civil fraud, where the civil standard of proof clearly applies, he did not think that cases involving fraud in themselves merited a higher standard of proof.

86. Neither is there any suggestion in the authorities that there may be a heightened standard simply because the matter involves a serious fraud with a large penalty. That is apparent from the reasoning of the Upper Tribunal in *Hannam*. We think that this case is a paradigm example of a case which is analogous to a civil fraud and on that basis, it would fall within the second category of cases identified by Lord Hoffmann, where clearly the civil standard of proof applies. Neither is there any suggestion that the case involves any restriction on Mr Hackett's liberty or freedom which might otherwise bring it within scope of the first category of cases identified by Lord Hoffmann. In the absence of any such factor in this case, as Mr Kinnear submitted, there is no rational justification to be derived from the authorities for the claim that the gravity of the consequences merits the application of the criminal standard of proof.

87. As far as the second reason is concerned, the penalty regime set out in Schedule 24 FA 2007 which, as we have observed, applies to both direct and indirect taxes, does not seek to make any difference in treatment as regards procedural and evidential matters where the level of culpability is based on deliberate behaviour and where it is based on careless behaviour. The distinction between those cases arises in respect of the level of penalty that may result.

88. There is no longer a specific reference to dishonesty as a criterion for imposing liability. The term "deliberate" can certainly embrace allegations of dishonesty. In this case, the way that HMRC have pleaded their case indicates that the allegation against Mr Hackett is that he intended that HMRC should rely on what was said in Intekx's VAT returns as being accurate without making a specific allegation of dishonesty. Therefore, we see nothing from the legislation that indicates that Parliament intended that in certain cases of deliberate behaviour, not necessarily involving dishonesty, a heightened standard of proof should apply.

89. As far as the third reason is concerned, Mr Burton puts forward no proper basis on which the FTT could draw the line as to whether in any particular case it had to apply the civil or criminal standard of proof. No indication is given as to what the level of penalty should be, the nature of the fraud involved or the extent of the involvement of the taxpayer in the alleged fraud. In the absence of a clear dividing line, the parties would be faced with having to proceed without knowing the applicable standard of proof, thereby giving rise to the need in many cases for a preliminary issue to decide the point. Furthermore, the FTT might decide in any particular case, having heard the evidence, that the level of culpability found was careless rather than deliberate which gives rise to the most unsatisfactory prospect of the standard of proof varying according to the findings actually made. In practice, that would be unworkable.

90. We therefore conclude, largely for the reasons also given by the FTT, that the standard of proof to be applied in this case is the civil standard of the balance of probabilities.

91. We therefore determine the Standard of Proof Issue in favour of HMRC.

The Intekx 2014 Issue

92. Mr Burton recognised that this issue was closely linked to the Standard of Proof Issue. He submitted that if Mr Hackett was successful on that issue, then it would be clearly wrong to admit *Intekx* 2014 as evidence in the proceedings.

93. As we have determined the Standard of Proof issue in favour of HMRC, the question for us is whether the FTT made an error of law in exercising its discretion to admit *Intekx* 2014 as evidence in these proceedings. The evidence was not admitted on the basis that it would be determinative in establishing whether Mr Hackett knew or ought to have known that the transactions to which the personal liability notice relates were connected with fraud. Rather it was admitted on the basis that it was relevant to the issues that needed to determined, because the transactions concerned must be examined not in isolation but having regard to their attendant circumstances and in that regard the tribunal is entitled to look at the totality of the deals effected by Intekx. Mr Burton did not dispute before us that to seek to relitigate the findings made in *Intekx* 2014 would be an abuse of the FTT's process and HMRC do not seek to argue that the findings in that decision are determinative of the current proceedings.

94. The FTT's decision to admit *Intekx* 2014 as evidence was a case management decision and this Tribunal will be very slow to interfere with such a decision. As summarised by the Upper Tribunal in *Wrottesley v HMRC* [2015] UKUT 637 (TCC) at [9] to [13], it will only seek to do so where one or more of the following applies:

(1) The FTT applied an incorrect principle;

(2) The FTT's decision was plainly wrong, or exceeded the generous ambit within which a reasonable disagreement is possible; and

(3) The FTT failed to take account of relevant considerations or took account of irrelevant considerations, including where there is an error in the balancing exercise and insufficient weight or too much weight was given to certain factors.

95. The FTT decided that the decision in *Intekx* 2014 was relevant for the reasons it gave at [49] of the Decision. We can detect no error of law in the FTT's approach. The FTT made the point that it will be for the tribunal that hears Mr Hackett's appeal to determine what weight, if any, is to be accorded to *Intekx* 2014 outside the confines of its own facts and circumstances. In those circumstances, there is no basis on which we can interfere with the FTT's decision on this point and indeed we agree entirely with the FTT's reasoning.

96. We therefore determine the *Intekx* 2014 Issue in favour of HMRC.

Disposition

97. The appeal is dismissed. The case is remitted to the FTT in order that the underlying appeal can proceed to a substantive hearing.

MR JUSTICE TROWER **JUDGE TIMOTHY HERRINGTON**

UPPER TRIBUNAL JUDGES
RELEASE DATE: 6 July 2020