



TC06098

Appeal number: TC/2010/09136

VALUE ADDED TAX – dishonest evasion penalty – whether the Appellant was dishonest within the meaning of Section 61 VATA 1994 – yes – appeal dismissed

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

PETER BROOKES

Appellant

- and -

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

**TRIBUNAL: JUDGE JANE BAILEY
 MR MOHAMMED FAROOQ**

Sitting in public at Centre City Tower, Birmingham on 17 May 2017

The Appellant appeared in person

Ms Jennifer Thelan of counsel, instructed by the General Counsel and Solicitor to HM Revenue and Customs, for the Respondents

DECISION

Introduction

5 1. This appeal by Mr Brookes is against a decision by the Respondents that his conduct was dishonest so that, in his capacity as the sole director of a company called Villagepark Homes Limited (“VPH”), he is personally liable under Section 61 Value Added Tax Act 1994 (“VATA 1994”) for a part of a dishonest evasion penalty assessed upon VPH under Section 60 VATA 1994.

10 Background

2. The hearing before us is a re-hearing of Mr Brookes’ appeal. The appeal was originally heard before the Tribunal (Judge Kevin Poole and Mr Will Silsby CTA) (the “first Tribunal panel”) in December 2012. The first Tribunal panel dismissed Mr Brookes’ appeal; this decision was reported at [2013] UKFTT 362. Mr Brookes
15 appealed against this decision to the Upper Tribunal. By a decision (reported at [2016] UKUT 0214 (TCC)), the Upper Tribunal (Mr Justice Newey) allowed Mr Brookes’ appeal and directed that the appeal be remitted back to the Tribunal either for the first Tribunal panel to make further findings or for a fresh hearing to take place. Judge Poole subsequently directed that a fresh hearing should take place before
20 a differently constituted panel. Before us both parties referred to aspects of the first Tribunal panel’s findings, and we also refer to those findings throughout this decision.

Relevant legislation

3. This appeal arises from the imposition of a penalty upon Mr Brookes under Section 61 VATA 1994. Section 61 provides that a penalty involving dishonesty
25 which has been assessed upon on a corporate body may, in certain circumstances, be recovered from an officer of that corporate body as if that officer were personally liable.

4. The relevant parts of Sections 60 and 61 of VATA 1994 at the relevant time provided as follows:

30 **60 VAT evasion: conduct involving dishonesty**

(1) In any case where—

(a) for the purpose of evading VAT, a person does any act or omits to take any action, and

35 (b) his conduct involves dishonesty (whether or not it is such as to give rise to criminal liability),

he shall be liable, subject to subsection (6) below, to a penalty equal to the amount of VAT evaded or, as the case may be, sought to be evaded, by his conduct.

(2) The reference in subsection (1)(a) above to evading VAT includes a reference to obtaining any of the following sums—

- (a) a refund under any regulations made by virtue of section 13(5);
- (b) a VAT credit;
- 5 (c) a refund under section 35, 36 or 40 of this Act or section 22 of the 1983 Act; and
- (d) a repayment under section 39,

in circumstances where the person concerned is not entitled to that sum.

...

10 **61 VAT evasion: liability of directors, etc**

(1) Where it appears to the Commissioners—

- (a) that a body corporate is liable to a penalty under section 60, and
- (b) that the conduct giving rise to that penalty is, in whole or in part, attributable to the dishonesty of a person who is, or at the material time was, a director or managing officer of the body corporate (a "named officer"),

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the Commissioners may serve a notice under this section on the body corporate and on the named officer.

(2) A notice under this section shall state—

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- (a) the amount of the penalty referred to in subsection (1)(a) above ("the basic penalty"), and
- (b) that the Commissioners propose, in accordance with this section, to recover from the named officer such portion (which may be the whole) of the basic penalty as is specified in the notice.

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(3) Where a notice is served under this section, the portion of the basic penalty specified in the notice shall be recoverable from the named officer as if he were personally liable under section 60 to a penalty which corresponds to that portion; and the amount of that penalty may be assessed and notified to him accordingly under section 76.

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...

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

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

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- (b) where an assessment is made on a named officer by virtue of subsection (3) above, the named officer may appeal against the Commissioners' decision that the conduct of the body corporate referred to in subsection (1)(b) above is, in whole or part, attributable to his

dishonesty and against their decision as to the portion of the penalty which the Commissioners propose to recover from him.

5 5. In this appeal, the Respondents seek a penalty in the sum of £40,439 from Mr Brookes. This is calculated as 60% of certain amounts of input tax which was claimed by VPH, and disallowed by the Respondents, for the VAT periods ended 11/05 and 02/06. (This is an increase from the amount determined by the first Tribunal panel due to the correction of a subsequently discovered arithmetical error.)

10 6. Although a penalty under Section 60 or 61 is calculated by reference to the VAT evaded or sought to be evaded, a penalty assessment may be raised even if the Respondents have missed the deadline to assess the VAT in question. This was confirmed by the Court of Appeal in *Ali (t/a Vakas Balti) v HMRC* [2006] EWCA Civ 1572.

The issue before us

15 7. Mr Brookes' appeal is against the Respondents' decision that VPH's conduct was in whole or in part "attributable to his dishonesty". Mr Brookes does not challenge the calculation of the underlying amounts of input tax which give rise to the penalty, or the size of the mitigation granted by the Respondents.

20 8. As Mr Brookes was the sole director of VPH at the relevant time, all of VPH's conduct is attributable to him. The only issue for us to determine is whether VPH's conduct is attributable to dishonesty on the part of Mr Brookes.

Onus and burden of proof

25 9. In considering this appeal we have at the forefront of our minds that the burden of proof is upon the Respondents to demonstrate that VPH's conduct is attributable to dishonesty on the part of Mr Brookes. The standard of proof is the civil standard of the balance of probabilities.

10. The test for dishonesty

30 11. For the Respondents, Ms Thelan addressed us upon the appropriate test for dishonesty in relation to a civil offence, and referred us to the recent Tribunal decisions in *N'Diaye v HMRC* [2015] UKFTT 0380 (TC) and *Osman v HMRC* [2016] UKFTT 524 (TC), both decided after the first Tribunal panel had released their decision. Mr Brookes' submissions focussed upon how his actions should be viewed and in countering the Respondents' allegations; we did not understand him to address us upon the relevant test for dishonesty.

35 12. We agree with the Respondents as to the correct test to be applied. We have been greatly assisted by the careful summary of the authorities and the analysis set out by the Tribunal in *N'Diaye*. We gratefully adopt the analysis at paragraphs 42 – 48 of *N'Diaye* and agree that the test for dishonesty in civil proceedings is (as set out in paragraph 49 of *N'Diaye*), primarily objective: was the behaviour dishonest according to normally accepted standards of behaviour? However, there is a subjective element.

Mr Brookes' own understanding is relevant to our consideration of whether his behaviour was dishonest – we do not need to consider whether Mr Brookes was aware that his actions fell below what would be considered to be acceptable standards (assuming we find that to be the case) but we do need to consider whether Mr Brookes knew all the facts which made it wrong for him to act as he did.

13. It is important that we consider what Mr Brookes actually knew or appreciated, and not what a reasonable person in Mr Brookes' position would have known. But in considering what Mr Brookes knew, we also bear in mind the comments of Lord Nicholls in *Royal Brunei Airlines Sdn Bhd v Tan* [1995] 2 AC 378 at 106, quoted at paragraph 45 of *Osman*:

Nor does an honest person in such a case deliberately close his eyes and ears, or deliberately not ask questions, lest he learn something he would rather not know, and then proceed regardless.

Evidence heard

14. For the Respondents we heard evidence from Ms Farrington and Mr Gittins. We found both of these witnesses to be careful, honest and credible. For the avoidance of doubt we accept Ms Farrington's evidence and Mr Gittins's evidence in their entirety.

15. Mr Brookes gave evidence on his own behalf. Although we found some parts of Mr Brookes' account to be coherent and credible, we do not accept everything that Mr Brookes told us. We bear in mind that Mr Brookes took no notes of events at the time and that he is reliant upon his memory of events which occurred a decade ago. With such a long intervening period there is the risk of a person re-writing in his or her own mind how events must have occurred. We also bear in mind that some of what Mr Brookes told us was said for the first time at the hearing before us and had not been mentioned either at the hearing before the first Tribunal panel in 2012, or to the Respondents at any time from 2007 onwards.

16. At the hearing before the first Tribunal panel, Mr Brookes had called Mr Griffiths to give evidence on his behalf. Mr Brookes decided not to call Mr Griffiths again. Mr Brookes told us that he no longer had a connection with Mr Griffiths and that he (Mr Brookes) instead intended to rely on the witness statement that Mr Griffiths had previously made and the findings made by the first tribunal panel. As we informed Mr Brookes during the course of the hearing, we read Mr Griffiths' witness statement (which was just one page) but we gave it limited weight given that Mr Griffiths did not appear before us to be questioned upon the contents of that statement.

Facts found

17. Although the essential background was agreed by the parties, there was considerable dispute with regard to certain aspects. In making our findings of fact we have attempted to follow the sequence of events as they happened, dealing with the points in dispute as they arise.

18. On the basis of the oral and documentary evidence before us, including the findings set out in the decision of the first Tribunal panel, we find as follows:

Mr Brookes' experience and the companies of which he was a director

19. Prior to the Highley housing development by VPH which forms the backdrop to this appeal, Mr Brookes had been involved with two other companies (Villagepark Developments Limited (“VPDL”) and Active Crest UK Limited) which undertook building construction and development. Mr Brookes was the sole director of VPDL. Mr Brookes' expertise was in managing the overall costs of construction. Mr Brookes told us that he was experienced in running a business but that he was not an expert in the tax aspects of a development, and that he employed an external book-keeper to do the books of the companies with which he was involved. Mr Brookes told us that although he had signed all of VPDL's and VPH's VAT returns, and was responsible for their accuracy, he had not checked them before signing them.

20. Under cross-examination before us Mr Brookes accepted that he knew by 2005 that there was no VAT on the sale by VPDL of new build houses but he told us that he would not have used (or understood) the term “zero-rated supply”. However, Mr Brookes also told us that he did not know at that time that VAT should not be charged to VPDL by its main contractor when constructing those new build houses. This lack of knowledge was challenged by the Respondents. In cross-examination, Mr Brookes was shown a June 2004 invoice from an electrical contractor to VPDL which stated:

TO CARRY OUT ELECTRICAL INSTALLATIONS IN FLATS. ALL WORK DONE IN JUNE	1,747.00
LESS £505.93 OVERPAID ON LAST INVOICE (No. 39020) – vat charged in error.	- 505.93
	Sub Total 1,241.07
	VAT 0.00
	Total 1,241.07

21. Mr Brookes told us that this contractor must have appreciated and corrected the error of its own accord as he had not challenged the earlier invoice. (There is one other invoice in our bundle – see paragraph 26 below – where VAT has been charged to a company of which Mr Brookes was sole director but we do not have a successive invoice to know if that other error was subsequently corrected.)

22. We have considered what Mr Brookes knew about VAT charged to VPDL and VPH. We accept that Mr Brookes was not an expert in VAT and that he employed a book-keeper to keep VPH's books. However, Mr Brookes was responsible for ensuring that each development went to plan: Mr Brookes secured funding, managed the budget and paid invoices. In each development, certain stages needed to be reached and signed off before the financing institutions would release the next tranche of funds. In calculating costs and managing the budget, it seems unlikely that a developer would not have known whether VAT would be charged by its main contractor, as this would make a considerable difference to cash flow. Given the need

to keep on track financially it also seems unlikely that a developer would not check invoices. The 2004 invoice (set out above in its entirety) is so brief that it is hard to see how it would be possible for anyone to check the final figure without noticing the correction – the inked endorsement “Pd” in a circle (which we take to mean the invoice has been paid) is written 25mm directly underneath “vat paid in error”. Whether or not it was Mr Brookes who challenged the erroneous imposition of VAT, the fact that VAT had been charged in error to VPDL and was being refunded must have come to Mr Brookes’ attention. We find, on the balance of probabilities, that from (at least) June 2004 onwards, Mr Brookes was (at the very least) aware that VAT was not always charged upon supplies made in the course of construction to the companies of which he was a director.

The Highley development

23. In November 2003, Mr Brookes incorporated VPH as the vehicle for a further residential development. This further development involved the construction of 20 new homes at Highley in Shropshire. In late 2004, Mr Brookes obtained planning permission for this construction by VPH.

24. According to the notes of meeting which took place between Mr Brookes and the Respondents in December 2008, Mr Brookes did not wish to manage the sub-contractors himself and so he decided that VPH would appoint a main contractor. In late 2004 or very early 2005, VPH appointed a company called Focus Strip Limited (“FS”) as its main contractor. The engagement was agreed through a verbal contract, and was not put in writing.

25. FS apparently had two directors: Mr Chris Griffiths and Mr Bill Young. Mr Young handled the paperwork and back office duties, and Mr Griffiths organised the labour and work on site. In his witness statement, made in 2013, Mr Griffiths claims only to have been FS’s site manager and not to have been a director. Whatever the true position, we find that at the time that Mr Brookes was dealing with FS at the Highley development, Mr Brookes understood Mr Griffiths to be involved in the running of FS, and authorised to make decisions and act on FS’s behalf.

26. In our bundle is a copy invoice dated 7 February 2005 from FS to VPH. This copy was obtained by Ms Farrington from FS’s liquidator. The parties agree, and we find, that it is a copy of a genuine invoice issued by FS to VPH. This invoice details that FS charged VPH £96,000 plus VAT for the excavation of foundations, pouring concrete, and brickwork, blockwork and laying beams. We find that by February 2005, work was underway at Highley. (We note that VAT should not have been charged on this zero-rated supply.)

27. By about March 2005, matters were not progressing as smoothly on site at Highley as Mr Brookes had hoped. Costs had increased as more work was required on the development, the contract was not being well-managed and the relationship between Mr Griffiths and Mr Young had deteriorated. Mr Brookes told us, and we accept, that in order to maintain progress he was obliged to turn up on site on Friday in order to pay Mr Griffiths amounts of cash which Mr Griffiths then used to pay the

labourers on site. Mr Brookes also issued company cheques directly to FS's suppliers in order that FS could buy the materials required. In our bundle there are copies of sample cheques issued by VPH, some of which are made to cash and some to what appear to be FS's suppliers. These sample cheques date from April to October 2005.
5 The first Tribunal panel found, and we concur, that these arrangements started from March 2005.

28. There came a time when Mr Brookes and Mr Griffiths decided that they would work better without the involvement of Mr Young. Mr Brookes could not remember exactly when that was but thought it was around the time of a serious car accident
10 involving Mr Griffiths (which the first Tribunal panel found happened in May 2005). In about July 2005 Mr Griffiths returned to work following his accident, and VPH ceased to use FS as its main contractor from this time. (Records at Companies House suggest that an unrelated creditor of FS presented a petition for its winding up at the beginning of July 2005. FS was wound up in October 2005.)

15 29. We find that there was a period of a few months when Mr Griffiths acted as main contractor, managing the sub-contractors on site. During this period Mr Brookes continued to provide Mr Griffiths with cash so that Mr Griffiths could pay the labourers and meet other financial obligations related to the Highley development.

30. At some point Mr Griffiths set up a company which could act as the new main
20 contractor for VPH. (The first Tribunal panel found, on the basis of Companies House records which are no longer available, that this occurred in October 2005.) That company was apparently called Design and Construction (West Midlands) Limited ("DC"). There was, and is, some confusion about the name because at one point FS was trading as Construction and Design Services, and the invoices
25 subsequently sought were apparently issued by "Construction & Design". VPH appointed DC as main contractor from October 2005 onwards. Mr Brookes continued to provide Mr Griffiths with cash after DC had been appointed as main contractor.

31. Mr Brookes told us that both FS and DC often required advances. Sometimes
30 VPH would owe sums to FS and DC. More often, FS and DC would owe amounts to VPH. Mr Brookes accepted that matters were in a muddle. The first Tribunal panel found that Mr Brookes did not obtain receipts for the cash he gave to Mr Griffiths. Although Mr Brookes cashed cheques to give sums to Mr Griffiths, Mr Brookes could not tell us how the amounts of cash he paid were reconciled to specific invoices issued either by FS or DC. Mr Brookes told us that he would pass any invoices
35 received to VPH's book-keeper (Ms Kite) for her to manage the reconciliation and the tax aspects. VPH's book-keeper also had access to VPH's cheque book stubs in order to note the amount which had been paid. The first Tribunal panel found that Ms Kite ran a form of purchase day book system, recording all incoming invoices, including the VAT element and the VAT element of all payments made and then compiling this
40 information into spreadsheets. We do not consider that it would have been possible for Ms Kite to know, from the cheque book stubs, what supplies were purchased with a cashed cheque or whether the amount paid included VAT.

VPH's VAT returns

32. VPH submitted VAT returns during the period of the Highley development and we were shown copies of page 1 of VPH's returns for the periods ended 05/05 to 05/10. The VAT periods with which we are concerned are those ended 11/05 and 02/06.

- 5 33. VPH submitted a VAT return for the VAT period ended 11/05, claiming £61,982 input tax. This included VAT which VPH apparently had been charged in respect of the Highley development. In making this claim for input tax, VPH relied upon (amongst others) the following invoices:

<u>11/05</u>	<u>Supplier</u>	<u>Input tax claimed by VPH</u>
	FS	£1,489.36
	FS	£10,832.60
	"Construction & Design"	£1,3752.90
	"Construction & Design"	£1,489.36
	"Construction & Design"	£11,587.00

- 10 34. VPH's input claim for 11/05 also relied upon invoices issued by (at least) four other suppliers.

35. For the VAT period ended 02/06, VPH claimed £39,308.31 input tax, including VAT which VPH apparently had been charged in respect of the Highley development. In making this claim, VPH relied upon (amongst others) the following invoices:

<u>02/06</u>	<u>Supplier</u>	<u>Input tax claimed by VPH</u>
	"Construction & Design"	£1,042.55
	"Construction & Design"	£9,302.44
	"Construction & Design"	£8,909.30
	"Construction & Design"	£8,001.75

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The role of Ms Kite

36. At some point after DC had become main contractor for VPH, Ms Kite (VPH's self-employed book-keeper) ceased to undertake book-keeping for VPH as the work became too much for her. Mr Brookes could not remember when this was but the
20 first Tribunal panel found that this was in very early 2006 and that Mr Brookes took

over preparation of VAT returns for the period 05/06 onwards. We concur in finding that Ms Kite was not involved in preparing VPH's VAT returns after February 2006.

37. Mr Brookes told us that for a period of time after Ms Kite ceased to work for VPH, he managed VPH's book-keeping himself. Thereafter VPH's accountants took over the work. When Mr Brookes undertook the book-keeping, his system was to put invoices which VPH received into a tray. Once those invoices were paid then they would be marked as paid and put in a drawer. At the end of each three month period, Mr Brookes added together the amounts on the paid invoices in order to complete VPH's quarterly VAT return. Mr Brookes would then send those invoices to his accountants for them to prepare VPH's annual accounts.

The conclusion of the Highley development

38. On the basis of the amounts of input tax claimed by VPH in its VAT returns, the first Tribunal panel concluded that the bulk of the work on the Highley development was finished by the end of August 2006. We find that the development concluded at the end of 2006 or beginning of 2007. Mr Brookes and Mr Griffiths then had no further involvement with each other until after the Respondents began their enquiries.

The first meeting between Mr Brookes and the Respondents

39. In late 2007, the Respondents selected VPH for inspection. A meeting was arranged on 15 November 2007 at VPH's accountants' offices. Mr Brookes was present for the first hour of that meeting; VPH's accountants were present throughout the meeting. Ms Farrington attended on behalf of the Respondents.

The request for invoices to support VPH's claim

40. Having been through VPH's papers (including what Ms Farrington called the company's Purchase Day Book but which Mr Brookes suggested should be described as simply a handwritten list of invoices), Ms Farrington produced a list of invoices which were not available to support the input tax claimed by VPH over five VAT periods. This list included eight invoices from FS over three periods including the two in dispute, and seven invoices from a company called Construction & Design (which we understand to be DC) over the two periods in dispute. In total there were 23 invoices from nine suppliers over five periods.

41. By letter dated 6 December 2007 to Mr Brookes, Ms Farrington set out her concerns with various aspects of VPH's VAT returns for the periods ended 05/05 to 05/06. There were three aspects to those concerns but the only aspect in that letter with which we are concerned in this appeal is the absence of invoices to support VPH's claim to input tax. (Ms Farrington was concerned with five VAT periods, we are only concerned with the VAT periods ended 11/05 and 02/06.) Ms Farrington enclosed a copy of the list of unavailable invoices with her letter, and request that Mr Brookes provide copies of these missing invoices. The nine invoices with which we are particularly concerned are those set out in paragraphs 33 and 35 above.

42. Pausing there, one aspect which Mr Brookes focussed upon in his submissions to us was that it must have been obvious to Ms Farrington that the invoices which were not available came from a main contractor, and so no VAT should have been charged to VPH, and no VAT should have been claimed by VPH. We note that the
5 invoices listed by Ms Farrington came from nine different suppliers, not one “obvious” main contractor. We accept Ms Farrington’s evidence that until she saw the missing invoices she could not know what was being supplied to VPH and so could not reach any conclusions about the taxability of that supply. One of Mr Brookes’ closing submissions was that while, at November 2007, he did not know
10 that VPH should not have been charged VAT by its main contractor, and so VPH should not have claimed input tax in its VAT returns, Ms Farrington did know the VAT rules. Mr Brookes argued that it followed that Ms Farrington should simply have rejected that aspect of VPH’s claim. Mr Brookes submitted that if Ms Farrington had rejected this aspect of VPH’s claim after the first meeting then there
15 would have been no need for him to try to find the unavailable invoices, and the ensuing events would not have occurred. We do not agree with Mr Brookes that Ms Farrington could know the nature of the supply or supplier without seeing the invoices, or that Ms Farrington was in a position to reject VPH’s claim before she was satisfied as to the nature of the supply. Had the point been as obvious as Mr Brookes
20 submits, then VPH’s accountant could have advised Mr Brookes during, or shortly after, the initial meeting that VPH should withdraw its claim.

Events during December 2007, and January and February 2008

43. Mr Brookes told us that after he received the letter of 6 December 2007 and once he appreciated that the Respondents wanted to see the invoices to support the
25 VPH’s input tax claim, then he asked VPH’s accountants to search their premises for the invoices requested. Mr Brookes could not recall how long that search took but, once it was concluded, Mr Brookes told us that he then contacted Mr Griffiths to ask him to provide duplicate invoices. Mr Brookes told us at one point that Mr Griffiths had taken three months to provide the duplicate invoices, and at another point that he
30 could not recall how long the search at his accountant’s offices had taken but that it had seemed as though he was waiting for a long time for Mr Griffiths to produce duplicates of the invoices originally issued.

44. Mr Brookes told us that in the week before the hearing before us, during the course of his preparations, it had occurred to him for the first time that it was
35 important that he made clear that there were original invoices from FS and DC, and that these originals had been lost. Mr Brookes told us that he had tried to contact VPH’s accountants in order to ask the relevant partner to confirm that the firm had undertaken a search to look for the missing original invoices. The relevant partner had been unavailable until the day before the hearing before us. Mr Brookes told us
40 that he had an electronic copy of a letter from that partner on his mobile telephone which would confirm the search. The Respondents objected to this letter being admitted in evidence given that they had not seen it, no notice had been given of this fresh evidence and that this point was made for the first time at the hearing before us. Mr Brookes told us that he had not appreciated the importance of there having been
45 original invoices until he had read the Upper Tribunal decision in the week before the

hearing before us. Mr Brookes accepted that the Upper Tribunal decision had been available to him since its issue in May 2016.

45. Having regard to the Direction that no new witnesses could be called without permission (and the absence of the partner in person to speak to the letter), the fact that the hearing before us was a re-hearing, and that Mr Brookes had not informed the Respondents of the existence of this letter before the hearing commenced, we informed Mr Brookes that we would not read the letter from his mobile telephone. However, as it was an intrinsic part of his evidence, we did hear Mr Brookes' oral evidence on the point.

10 Were original invoices issued for the periods 11/05 and 02/06?

46. Mr Brookes told us that VPH had received the originals of the nine invoices listed above which were not available in November 2007. Mr Brookes told us that although he remembered the generality of the invoices, he did not recollect the specific details of each invoice. Mr Brookes told us that the original invoices received by VPH must have been lost by VPH's accountant or book-keeper but that he himself had not lost them. The Respondents challenged Mr Brookes' evidence that VPH had ever received original invoices. Ms Thelan submitted there was evidence to suggest that no original invoices had ever been issued:

- VPH had not retained any of the invoices listed;
- When Ms Farrington had visited the receivers of FS and DC, neither supplier had copies of any of the invoices listed;
- Mr Griffiths had not been able to reissue proper duplicates of any of the DC invoices listed when asked to do so;

47. We bear in mind that we were shown two invoices issued for earlier periods, one of which was addressed to VPH. Although these two invoices were said to be one each from FS and DC, we find that both were issued by FS. The second invoice was headed "Construction and Design Services" (not DC) but at the bottom it was stated that Construction and Design Services was a trading name of FS. The VAT number quoted on the invoice was that of FS. We have not seen a copy of any genuine invoice issued by DC in any period to any customer.

48. We have considered very carefully whether original invoices were issued by FS and DC to VPH, as Mr Brookes submits. We have had particular regard to Mr Brookes' closing submission that there should have been original invoices, and that he would have expected original invoices. We agree with Mr Brookes that usual practice would be for suppliers to issue invoices to their customers, but that does not mean that either FS or DC actually did issue invoices to VPH in either relevant VAT period.

49. On the basis of the two FS invoices which we were shown, we find that as late as February 2005, FS issued an invoice to VPH for work undertaken at the Highley development. At that time FS was the main contractor. FS ceased to be main contractor in July 2005. After July 2005, Mr Young had lost his site manager / fellow director as well as the VPH contract, and he had to manage matters on its own. Mr

Brookes' evidence was that the payments of cash that he made to Mr Griffiths on site were often made in advance of work being undertaken. Mr Brookes told us, and we have found, that FS owed money to VPH more often than VPH owed money to FS. FS appears to have been wound up in October 2005. FS was not VPH's main contractor during the VAT period 11/05, and it no longer supplied services to VPH. FS had received cash in advance of the services it supplied to VPH so did not need to seek payment from VPH for prior work. There was no reason for FS to issue invoices to VPH after July 2005. Bringing all of these considerations together, on the balance of probabilities we find that FS did not issue to VPH either of the two invoices listed in paragraph 33 above for the period ended 11/05.

50. We have seen no evidence that DC ever issued an invoice to VPH. When DC took over the main contract for the Highley development, Mr Griffiths would have had to take on the paperwork and back office support work which he had not previously had to undertake when he was involved with FS. This work would have been in addition to managing the work on site. The on-site work required, and the costs of the development, were both increasing as unplanned aspects of the development emerged. Mr Griffiths would have been very busy. We accept Mr Brookes' evidence that he continued to provide Mr Griffiths with cash to pay the labourers, and that VPH made cheques direct to suppliers. Given that DC was being given cash by Mr Brookes, DC did not need to issue invoices to VPH to obtain payment. No invoices were found at DC's receiver. Drawing these aspects together, on the balance of probabilities we find that DC did not issue to VPH any of the invoices listed in paragraphs 33 or 35 above for the periods ended 11/05 or 02/06.

51. In reaching this conclusion that there were no original invoices, we have asked ourselves whether it is credible that an experienced businessman such as Mr Brookes would have continued to pay either FS or DC in the absence of invoices. We have noted the first Tribunal panel's finding that Mr Brookes did not obtain receipts for the amounts of cash he handed to Mr Griffiths, and Mr Brookes' evidence that the contract between FS and VPH was not put in writing. We have borne in mind Mr Brookes' evidence about his experience in managing a development and handling the overall costs. We take the view that Mr Brookes was more concerned with ensuring that the development continued than in ensuring that his paperwork was in perfect order. While DC was making progress with the development, we consider it likely that long periods of time would pass without invoices being issued to regularise the informal position of Mr Brookes advancing cash to Mr Griffiths.

Was there a search for the missing invoices?

52. Although we have found that none of the nine invoices listed for 11/05 or 02/06 were issued, that does not mean that we find that Mr Brookes necessarily recalled in December 2007 that no original invoices had been issued to VPH by FS or DC. Ms Kite was still responsible for the book-keeping in both of these periods. Invoices had been issued to VPH by FS at an earlier stage of the development. It seems to us to be possible (we put it no higher) that Mr Brookes, in trying to recollect events, could have persuaded himself that invoices ought to have been issued, and so they must have been issued. If that happened then it is also possible for Mr Brookes

subsequently to have reached the conclusion (as there were no such invoices in his possession) that those original invoices must have been lost by VPH's accountants or book-keeper, and to have instituted a search.

53. However, in December 2008, when Mr Brookes was interviewed by the Respondents in a meeting at which four of Mr Brookes' agents were present, neither Mr Brookes nor the agents mentioned that a search had been made for the invoices Ms Farrington had requested. Those notes state:

3.5 Village Park Homes

PG mentioned the VAT inspection dated 15 November 2007. PB stated that he was unsure why the invoices from Focus Strip could not be found. He presumed they were lost and he asked Chris Griffiths for duplicates on a number of occasions and eventually Chris Griffiths turned up with some invoices prepared on a home PC which PB described as useless.

54. While it is not possible for everything said at a meeting to be noted, the paragraph set out above does not give the impression that a full scale search has been made to find the invoices. Although other corrections were made to the Respondents' notes, Mr Brookes' agents do not mention having undertaken a search when they sent Mr Brookes' comments upon the notes back to the Respondents under cover of a letter dated 13 March 2009.

55. We conclude that, if there was a search by VPH's accountants for missing invoices, then such a search was limited in its scale and scope, and was sufficiently brief that it was not worth mentioning to the Respondents a year later.

56. We find that at some point after receiving Ms Farrington's letter of 8 December 2007, Mr Brookes got back in touch with Mr Griffiths to ask him to provide duplicates of the invoices which the Respondents had asked to see. Mr Griffiths (in his witness statement) indicates that Mr Brookes contacted him in December 2007 asking for copy invoices from FS and DC. Mr Brookes told us he was chasing Mr Griffiths for three months, indicating that the contact was in early December 2007.

57. We find that towards the end of February 2008, Mr Griffiths and Mr Brookes met. In his witness statement Mr Griffiths states:

In February of 2008 I provided Mr Brookes copy invoices as requested however these were not in the same format as the invoices that we originally given to him. The original invoices were completely different to the ones I gave him. The invoices that I gave him were the ones that were given to me by the director of Construction & Design and Focus Strip Ltd.

58. To the extent that the reference to "Construction & Design" is to the trading name of FS, we accept that its director was a person other than Mr Griffiths. If "Construction & Design" is intended as a reference to DC – which seems more likely in this context – then Mr Griffiths is the only person who could have been DC's

director. It is odd that he does not appear to know DC's correct name and also odd that he seems to suggest he was not DC's director.

59. At paragraph 17 of its decision, the first Tribunal panel accepted Mr Griffiths evidence that:

5 ... he contacted Bill Young and, after several attempts and some time, he obtained from him a set of documents that purported to be copies of the invoices in question.

60. However, the first Tribunal panel also noted (at paragraph 20):

10 Given the Appellant's evidence that the change from FS to DC had happened on the transfer of the building contract to CG [Mr Griffiths] when CG and Bill Young had "fallen out" in the late summer of 2005, it appears odd that Bill Young had provided to CG not only documents purporting to be copies of FS invoices (covering the period March to October 2005) but also copies of documents purporting to be copies of DC invoices (which covered the period
15 from October 2005 to February 2006), DC being a company with which Bill Young, on the Appellant's evidence, was supposedly not involved.

61. We concur in finding it odd that Mr Young could be involved with DC, and we find that he was not so involved.

20 62. We also find it unlikely that Mr Griffiths would have had any continuing involvement with FS given that he claimed not to have been a director of FS. Under cross-examination before us, Mr Brookes said that the details of the split between Mr Young and Mr Griffiths were of no interest to him, and that he did not know that Mr Griffiths could not have had access to FS's papers. Given that Mr Brookes knew that FS had been supplanted by DC as main contractor, and that Mr Brookes had told the
25 first Tribunal panel that Mr Young and Mr Griffiths had "fallen out", it seems to us extremely unlikely that Mr Brookes would have considered Mr Young and Mr Griffiths would have been on sufficiently good terms for Mr Young to issue duplicate FS invoices for Mr Griffiths.

30 63. We find that at the meeting between Mr Griffiths and Mr Brookes in February 2008, Mr Griffiths gave Mr Brookes certain documents. We make no finding as to whether those documents were provided by Mr Young to Mr Griffiths or produced by Mr Griffiths.

35 64. Copies of fifteen of the documents which Mr Griffiths gave to Mr Brookes appear in our bundle. Nine of these fifteen documents purport to be invoices issued by FS to VPH; the remaining six purport to be invoices issued by DC to VPH. Having seen genuine FS invoices, we accept Mr Brookes' evidence that he could see immediately that the documents given to him by Mr Griffiths looked nothing like genuine invoices issued by FS.

40 65. It is common ground that these fifteen documents given to Mr Brookes by Mr Griffiths in February 2008 (the "copy invoices") were not duplicates of invoices

issued by either FS or DC. We find the copy invoices to be of a much more basic design than either of the genuine invoices from FS which we were shown. The copy invoices show more limited information and are predominantly calculated backwards, that is to say applying the VAT fraction to a total cost price to reach the proportion of the price which was VAT (rather than the more usual method of stating the net cost of the supply, adding VAT and then stating the total price). The copy invoices said to be from FS show months, rather than full dates; the copy invoices said to be from DC show no dates at all.

66. The most startling aspect of the copy invoices is that they contain a reference to the order in which they appear in Ms Farrington's list, provided under cover of her letter of 6 December 2007. Both the FS and DC copy invoices refer to "payment number" (and then list 1-9 for FS and 1-6 for DC). This identical formatting is despite FS and DC being separate companies run by different people. On the basis of those references we find that the copy invoices were created after 6 December 2007. It must have been clear to anyone who looked at the detail of the copy invoices, that the copy invoices were not duplicates of invoices originally issued in the VAT periods 11/05 or 02/06.

67. Mr Brookes told us that he knew that the copy invoices "were not correct copies" and that he considered the copy invoices to be "useless". Mr Brookes explained that what he meant by those descriptions was that the copy invoices bore no visual resemblance to original invoices issued by FS or DC. Mr Brookes told us, and we accept, that he did not look at the amounts on the copy invoices so he did not know if the substance of the invoices was the same as the invoices which Ms Farrington had listed. Mr Brookes told us that because the copy invoices:

looked so different [from original invoices], I didn't scrutinise them on an invoice by invoice basis

68. Mr Brookes was clear in his evidence to us that, as he had not looked at the detail of the copy invoices, he had no way of knowing if the substance of the invoices was accurate. As he did not look at the detail of the invoices, we find that in February 2008 Mr Brookes was not aware that the copy invoices contained references to Ms Farrington's list of the unavailable invoices.

69. Mr Brookes told us, and we accept, that he was extremely angry with Mr Griffiths because of what had provided but Mr Griffiths had told him that the copy invoices were all that he (Mr Griffiths) could provide.

Submission of the copy invoices to the Respondents

70. Mr Brookes told us that once he was in possession of the copy invoices he telephoned the advisor who had been acting in relation to the Respondents' enquiry. Mr Brookes told us that he had informed his advisor that the copy invoices were useless, that they were nothing like the original invoices, but his advisor had told Mr Brookes to send the copy invoices on to him anyway. Mr Brookes told us that he had then posted the invoices to his advisor without a covering note or any written

commentary upon the copy invoices. The advisor then sent the copy invoices to the Respondents, also without any explanation. Mr Brookes accepted that he had not instructed his advisor to tell the Respondents that he (Mr Brookes) considered the copy invoices to be useless, and he had not seen the advisor's letter to the Respondents before it was sent.

71. The Respondents challenged Mr Brookes' account of these events, arguing it was inconceivable that a professionally qualified person such as Mr Brookes' advisor would have submitted the copy invoices to the Respondents without qualification if he was aware that they were not duplicates of original invoices. The Respondents also noted that the first time that Mr Brookes had said that he had told his advisor that the invoices were useless was at the hearing before us. Ms Thelan submitted that it was inconceivable that this point would not have been mentioned before, at some stage, if it was the case.

72. We have considered this aspect at great length. We have had in mind that Mr Brookes' advisor was apparently not asked to attend either before the first Tribunal panel or before us, despite Mr Brookes having been in touch with VPH's accountants in the week before the hearing before us. The advisor is presumably unaware of the suggestions made as to his conduct.

73. We consider that, if Mr Brookes had told his advisor that the copy invoices did not resemble original invoices issued by DC and FS, it is exceptionally unlikely that the advisor would simply ask for the copy invoices to be sent to him without enquiring further as to the documents' provenance. If Mr Brookes had told his advisor of his concerns we consider it overwhelmingly likely that the advisor would have enquired further of Mr Brookes, would have scrutinised the copy invoices when he received them from Mr Brookes, and that the advisor would have noticed the references to the Respondents' schedule which we have noted in paragraph 66 above. Given these references, we consider that it is exceptionally unlikely that Mr Brookes' advisor would be willing to risk his professional reputation by submitting the copy invoices to the Respondents, as if they were duplicates of the invoices sought, without any explanation. As the advisor is AIT qualified, we find that he would have been fully aware of the consequences of submitting apparently fake documents to the Respondents without any explanation of those documents' origin. On the balance of probabilities, we find that Mr Brookes did not tell his advisor about his concerns with the copy invoices or that he considered them to be useless. On the basis of Mr Brookes' oral evidence, we find that Mr Brookes sent the copy invoices to his advisor without written comment or explanation.

74. It is common ground that the advisor submitted the copy invoices to the Respondents without comment or explanation. The relevant part of the covering letter, dated 29 February 2008, states:

I also enclose copies of the missing purchase invoices that Peter Brookes has obtained.

I hope that this information will enable you to finalise your inspection

75. Ms Farrington told us that the copy invoices were not acceptable evidence to support VPH's input tax claim but that, after receipt of the copy invoices, she was still prepared to accept that the transactions (which the copy invoices were intended to evidence) had occurred. Therefore Ms Farrington wrote to Mr Brookes, on 6 March 5 2008, seeking "acceptable proof of payment". However, Ms Farrington was also concerned that the copy invoices were not genuine; Ms Farrington told us that she was "unnerved" by the copy invoices, and that she discussed the matter informally with her local civil penalty team. On 1 April 2008, Ms Farrington made a referral to the local Civil Investigation of Fraud team.

10 76. In April 2008, either Mr Brookes or his advisor provided Ms Farrington with copies of VPH's bank statements which showed amounts being paid out. On 18 April 2008, Ms Farrington asked Mr Brookes to provide copies of sample cheques in order to identify the recipient of the sums which had left VPH's bank account. In June 15 2008, Mr Brookes' advisor provided Ms Farrington with copies of the cheques requested. The advisor also explained that although three of the April 2005 cheques were made to FS, the remaining cheques were made to cash or to FS's suppliers due to the financial difficulties FS was experiencing.

77. At the end of July 2008, Ms Farrington visited the receivers of first DC and then FS to examine their records. Specimen invoices were obtained from each of DC and 20 FS. Comparison of these specimens and the copy invoices led Ms Farrington to conclude that the copy invoices were not duplicates of invoices issued by DC or FS.

78. In August 2008, the Respondents raised a VAT assessment in the sum of £127,772 upon VPH to recover the input tax claimed in VPH's VAT returns. Interest of £24,777.90 was also charged. In November 2008, Mr Brookes was invited to a 25 Code of Practice 9 ("COP9") meeting with the Respondents' Civil Investigation of Fraud team. An initial COP9 meeting, between the Respondents, Mr Brookes and four of his agents, took place on 9 December 2008. A further COP9 meeting took place on 5 August 2009.

79. On 27 July 2010, the Respondents informed Mr Brookes that they considered 30 VPH was liable to a civil evasion penalty in the sum of £90,505 for the periods ended 11/05 to 11/06, and that he was personally liable to a civil evasion penalty in the sum of £47,270. On 22 September 2010, Mr Brookes sought a review of both penalty assessments. In a letter of review dated 3 November 2010, the Respondents reduced the civil evasion penalty raised upon Mr Brookes to £43,753. By a Notice of Appeal 35 received by this Tribunal on 30 November 2010, Mr Brookes appealed to this Tribunal.

Was Mr Brookes dishonest?

80. Having set out above what we consider to be the appropriate test for dishonesty, we now apply that test. We consider first whether Mr Brookes' behaviour was 40 dishonest according to normally accepted standards of behaviour (the objective element) and then consider what Mr Brookes actually knew or did not know about the relevant facts (the subjective element).

The objective element

81. We consider whether ordinary honest people would consider Mr Brookes' conduct to be dishonest.

5 82. We bear in mind the backdrop, which is that the Respondents had asked Mr Brookes to provide the invoices which would establish that VPH had paid amounts of input tax which it was entitled to reclaim. Mr Brookes had caused to be sent, without qualification, documents which purported to be copies of the invoices which the Respondents sought – i.e. the invoices which would substantiate VPH's entitlement to input tax.

10 83. In those circumstances we consider that ordinary honest people would consider it dishonest for a person to send to the Respondents documents which he knew did not bear any resemblance to the original invoices, without an explanation, as though those documents were the invoices requested.

84. The subjective element

15 85. We turn to look at what Mr Brookes actually knew or did not know. From our findings of fact above, we derive the following:

- 20 a) Mr Brookes knew that the Respondents wanted to see original invoices or reissued duplicates of the original invoices, as evidence that FS's and DC's supply to VPH included a charge to VAT. Mr Brookes knew that VPH would be required to pay back the input tax claimed if he could not satisfy the Respondents that VPH was entitled to the amount of input tax which had been claimed.
- b) Mr Brookes knew that VPH had paid large amounts of cash to FS and/or DC and/or Mr Griffiths.
- 25 c) Mr Brookes considered the copy invoices he received from Mr Griffiths in February 2008 to be useless because they did not look like original invoices.
- 30 d) Irrespective of what Mr Brookes understood about Mr Griffiths' relationship with Mr Young or Mr Griffiths' access to FS after the split between Mr Young and Mr Griffiths, following his February 2008 meeting with Mr Griffiths, Mr Brookes knew that he was highly unlikely to obtain reissued duplicates of invoices issued by FS or DC because Mr Griffiths had told Mr Brookes that the copy invoices were all he could provide.
- 35 e) Mr Brookes had not inspected the copy invoices sufficiently to know if the input tax stated on the copy invoices matched the amount claimed in VPH's VAT return, fell short or exceeded the original claim. Mr Brookes did not know if the copy invoices accurately reflected the total amounts he had paid to FS or DC.

- f) As he had not inspected the copy invoices, Mr Brookes did not know that the copy invoices bore numbering which matched Ms Farrington’s list, so that the copy invoices could not be reissued duplicates of original invoices.
- 5 g) Mr Brookes knew that Ms Farrington had not seen original FS and DC invoices and so could not know what they looked like. Mr Brookes did not know that Ms Farrington would subsequently visit the liquidators in order to view genuine invoices issued by FS and DC.
- 10 h) Mr Brookes posted the copy invoices to his advisor without any reference to what he knew about their deficiencies. Mr Brookes did not tell his advisor that the copy invoices were useless or instruct him to tell the Respondents that the copy invoices were useless.
- 15 i) Mr Brookes did not tell the Respondents that he considered the copy invoices to be useless until December 2008, once the COP9 enquiry had been opened. This was nine months after the copy invoices had been sent to the Respondents.

Our conclusions on dishonesty

86. In his closing submissions Mr Brookes argued that in seeking duplicate invoices from Mr Griffiths he had done just what normal people would do and that he had assumed he was going to be given duplicates of the invoices originally issued. On the basis that we have found that Mr Brookes did not necessarily recollect that there were no original invoices, we agree that ordinary people would not necessarily consider it dishonest of Mr Brookes to seek duplicate invoices from Mr Griffiths.

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87. Mr Brookes submitted that sending “useless” invoices to the Respondents did not make him dishonest. Mr Brookes referred to two passages in the transcript of the hearing before the Upper Tribunal which we understand him to be arguing is his position. These are encapsulated in the second of these passages (at page 17 of the transcript):

25

Mr Justice Newey: If the tribunal thought that Mr Brookes believed not merely that these “rubbishy” documents had been produced at this point, but that they did not reflect pre-existing reality because there had been no earlier invoices and no input tax incurred, then no problem with dishonesty. If, on the other hand, Mr Brookes thought that they did reflect a pre-existing reality, it is much more difficult to say it was dishonest.

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88. We do not agree with Mr Brookes that the second of the two positions set out by Mr Justice Newey in that passage does accurately reflect his own position. We accept that Mr Brookes may (erroneously) have thought that there were original invoices. However, Mr Brookes told us that he did not check the contents of the documents from Mr Griffiths. As he did not check the copy invoices, and did not look at the figures, Mr Brookes could have no idea whether the documents he submitted to the Respondents accorded with his recollection of a pre-existing reality.

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89. We consider that ordinary honest people would consider it dishonest for a person to send documents to the Respondents when that person:

- knows the documents to be sent are not true copies of the documents which the Respondents seek,
- 5 • knows the Respondents have not seen the originals of the documents they seek, and he has no reason to believe that the Respondents will be able to identify that the documents to be sent are not true copies of the documents they seek,
- knows the documents sought are to support a claim for input tax, and
- 10 • knows the documents sent contain figures which he has not looked at or checked, and which may exaggerate either the total amounts paid or the VAT paid,

but does not tell the Respondents what he knows about the documents.

90. We consider that Mr Brookes had the requisite knowledge to make him
15 dishonest in acting in the way that he did.

91. Mr Brookes told us that he had “no alternative” but to submit the copy invoices as both the Respondents and his advisor were chasing him to provide the missing invoices. We do not agree there were no alternatives but, even if Mr Brookes considered he had no alternative but to send the copy invoices, it was not necessary
20 for Mr Brookes to remain silent about his opinion of the copy invoices. Mr Brookes had the option of telling the Respondents that he did not consider the copy invoices to be reissued duplicates of original invoices and that he did not know (because he had not checked) whether the figures accurately reflected payments VPH had made. In choosing to remain silent, in these circumstances, we consider that Mr Brookes acted
25 dishonestly.

92. Mr Brookes argued that a dishonest person would have conducted himself differently from the beginning, for example in not allowing the Respondents to see that VPH’s records had so many missing invoices, or in making much better copies of the missing invoices. It may be the case that a thoroughly dishonest person would act
30 in the way Mr Brookes suggested, and ordinary honest people would certainly regard the forging of documents to be dishonest conduct. The Respondents do not allege, and we do not conclude, that the entirety of Mr Brookes’ conduct was dishonest. However, it is possible for a person to act honestly in some situations but to act dishonestly in other situations or under certain circumstances. There can be a lapse in
35 standards. Acting dishonestly in one regard still amounts to dishonest conduct.

93. We conclude that Mr Brookes did act dishonestly when he caused the copy invoices (which he knew were not true copies of original invoices and which he had not checked to see if they contained accurate figures) to be submitted to the

Respondents (in response to the Respondents' request for invoices to support VPH's input tax claim) without any reference to his concerns and without any qualification.

Conclusion

5 94. We have concluded that Mr Brookes did act dishonestly. It follows that we conclude that VPH's conduct is attributable to dishonesty on the part of Mr Brookes. We confirm the civil evasion penalty imposed under Section 61 VATA 1994 upon Mr Brookes, in the sum of £40,439. This appeal is dismissed.

10 95. This document contains full findings of fact and reasons for the decision. Any party dissatisfied with this decision has a right to apply for permission to appeal against it pursuant to Rule 39 of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009. The application must be received by this Tribunal not later than 56 days after this decision is sent to that party. The parties are referred to "Guidance to accompany a Decision from the First-tier Tribunal (Tax Chamber)" which accompanies and forms part of this decision notice.

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**JANE BAILEY
TRIBUNAL JUDGE**

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RELEASE DATE: 08 SEPTEMBER 2017