[2022] UKFTT 00047 (TC)

TC 08399

VAT – preliminary issue – whether Ablessio principle only applicable to party committing VAT fraud itself or also of application to a party who has facilitated VAT fraud of another party – applicable to both a party committing VAT fraud and a party facilitating VAT fraud – dishonesty of facilitating party not required – test is whether facilitating party knew or should have known it was facilitating VAT fraud

FIRST-TIER TRIBUNAL
TAX CHAMBER

Appeal number: TC/2019/06208

BETWEEN

IMPACT CONTRACTING SOLUTIONS LIMITED **Appellant**

-and-

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

TRIBUNAL: JUDGE GERAINT WILLIAMS

Sitting in public on 1 September 2020 by way of remote video hearing on the Tribunal video platform. A face-to-face hearing was not held because of the Covid-19 pandemic.

Mr Tim Brown, counsel, instructed by Duncan Lewis Solicitors, for the Appellant

Mr Howard Watkinson, counsel, instructed by the General Counsel and Solicitor to HM Revenue and Custom, for the Respondents

DECISION on PRELIMINARY ISSUE

INTRODUCTION

1. On 17 July 2020 following a case management hearing the Tribunal directed that there be a preliminary issue hearing to determine the *Valsts ieņēmumu dienests v Ablessio SIA* Case C-527/11 ("*Ablessio*") argument that had arisen as a new ground of appeal. The Appellant, Impact Contracting Solutions Limited ("ICSL") had appealed against the decision of the Respondents ("HMRC") on 16 September 2019 to cancel ICSL's VAT registration number with immediate effect. The decision was made under the principle in *Ablessio* on the basis that HMRC considered that ICSL was principally or solely registered to abuse the VAT system by facilitating VAT fraud.

2. By way of brief background, ICSL was incorporated and registered for VAT from 2015. ICSL operated in the labour provision market and its customers were temporary work agencies and its suppliers were approximately 3,300 mini umbrella companies ("MUCs") which supplied labour. HMRC's basis for the assessment and deregistration was that the arrangements between ICSL and the MUCs were contrived with the effect that the MUCs failed to properly account for VAT on their supplies to ICSL.

3. The preliminary issues to be determined are:

Question 1

Does the principle in *Ablessio* apply only to a party that has itself fraudulently defaulted on its VAT obligations, or does it similarly apply to a party who has facilitated the VAT fraud of another party?

Question 2

If the principle in *Ablessio* does apply to a party who has facilitated the VAT fraud of another party, is simple facilitation sufficient, or must it additionally be proved that:

(a) the facilitating party was itself dishonest; or

(b) the facilitating party knew that it was facilitating the fraud, and/or

(c) the facilitating party should have known that it was facilitating the fraud?

RELEVANT LEGISLATION

4. On exit day (31 January 2020), the UK ceased to be an EU Member State. There was then an implementation period ("IP"), during which the UK continued to be subject to EU law. The IP ended at 11pm on 31 December 2020 ("IP completion day").

5. The European Union (Withdrawal) Act 2018 ("EU(W)A 2018") captures EU-derived rights and legislation that are retained in UK law after IP completion day, while the Taxation (Cross-border Trade) Act 2018 ("T(CbT)A 2018") contains specific provisions on the continuing relevance of EU law to the UK's VAT rules. Section 42(4) T(CbT)A 2018 expressly confirms that the *Halifax* and *Kittel* principles continue to be relevant: "One of the consequences of the provision made by [EU(W)A 2018] is that the principle of EU law preventing the abuse of the VAT system (see, for example, the cases of *Halifax* and *Kittel*) continues to be relevant, in accordance with [EU(W)A 2018], for the purposes of the law relating to value added tax." Section 42(5) states: "Where the principal VAT directive remains relevant for determining the meaning and effect of the law relating to value added tax, that directive is to be read for that purpose in the light of the provision made by the implementing VAT regulation but ignoring such of its provisions as are excluded by regulations made by the Treasury by statutory instrument."

6. All references are to Directive 2006/112 ("PVD") unless stated:

> "Art. 9
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> 1.'Taxable person' shall mean any person who, independently, carries out in any place any economic activity, whatever the purpose or results of that activity.
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> Any activity of producers, traders or persons supplying services, including mining and agricultural activities and activities of the professions, shall be regarded as 'economic activity'. The exploitation of tangible or intangible property for the purposes of obtaining income therefrom on a continuing basis shall in particular be regarded as an economic activity.
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> Art. 213(1)
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> Every taxable person shall state when his activity as a taxable person commences, changes or ceases.
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> Member States shall allow, and may require, the statement to be made by electronic means, in accordance with conditions which they lay down.'
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> Art. 214
>
> 1. Member States shall take the measures necessary to ensure that the following persons are identified by means of an individual number:
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> (a) every taxable person, with the exception of those referred to in Article 9(2), who within their respective territory carries out supplies of goods or services in respect of which VAT is deductible, other than supplies of goods or services in respect of which VAT is payable solely by the customer or the person for whom the goods or services are intended, in accordance with Articles 194 to 197 and Article 199;
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> (b) every taxable person, or non-taxable legal person, who makes intra-Community acquisitions of goods subject to VAT pursuant to Article 2(1)(b) and every taxable person, or non-taxable legal person, who exercises the option under Article 3(3) of making their intra-Community acquisitions subject to VAT;
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> ...
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> 2. Member States need not identify certain taxable persons who carry out transactions on an occasional basis, as referred to in Article 12.
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> Art.273
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> Member States may impose other obligations which they deem necessary to ensure the correct collection of VAT and to prevent evasion, subject to the requirement of equal treatment as between domestic transactions and transactions carried out between Member States by taxable persons and provided that such obligations do not, in trade between Member States, give rise to formalities connected with the crossing of frontiers."

ABLESSIO DECISION

7. On 14 March 2013 the Second Chamber of the CJEU gave judgment in a case where the Latvian tax authority refused to register *Ablessio* in the register of taxable persons subject to VAT. The Latvian tax authorities had refused to register *Ablessio* for VAT purposes on the grounds that the company "did not have the material, technical and financial capacity to carry out the declared economic activity, namely providing construction services", at [9].

8. The grounds relied upon by the Latvian tax authority were held not to be sufficient grounds for refusing registration:

> "27. Consequently, Directive 2006/112, and particularly Articles 213 and 214, preclude the tax authority of a Member State from refusing to assign a VAT identification number to applicants solely on the ground that they are not in a position to show that they have at their disposal the material, technical and financial resources to carry out the economic activity declared at the time of submitting their application for registration on the register of taxable persons."

9. However, the CJEU went on to say:

> "28. However, according to settled case-law of the Court, Member States have a legitimate interest in taking appropriate steps to protect their financial interests, and the prevention of tax evasion, avoidance and abuse is an objective recognised and encouraged by Directive 2006/112 (see, in particular, Case C-255/02 *Halifax and Others* [2006] ECR I-1609, paragraph 71; Case C-285/09 *R.* [2010] ECR I-12605, paragraph 36; and Case C-525/11 *Mednis* [2012] ECR I-0000, paragraph 31).
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> …
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> 30. Therefore, Member States can, in accordance with Article 273, first paragraph, of Directive 2006/112, legitimately take measures that are necessary to prevent the misuse of identification numbers, in particular by undertakings whose activity, and consequently their status as taxable persons, is purely fictitious. However, these measures must not go beyond what is necessary for the correct collection of the tax and the prevention of evasion, and they must not systematically undermine the right to deduct VAT, and hence the neutrality of that tax (see, to that effect, Case C-146/05 *Collée* [2007] ECR I-7861, paragraph 26; *Nidera Handelscompagnie*, paragraph 49; *Dankowski*, paragraph 37; and *VSTR*, paragraph 44).
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> …
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> 34. In order to be considered proportionate to the objective of preventing evasion, a refusal to identify a taxable person by an individual number must be based on sound evidence giving objective grounds for considering that it is probable that the VAT identification number assigned to that taxable person will be used fraudulently. Such a decision must be based on an overall assessment of all the circumstances of the case and of the evidence gathered when checking the information provided by the undertaking concerned.
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> 35. It is for the referring court - which alone has jurisdiction both to interpret the national law and to find and assess the facts in the case before it and, in particular, the way in which that law is applied by the tax authority (see, to that effect, *Mednis*, paragraph 33 and the case-law cited) - to determine whether the national measures are compatible with European Union law, in particular the principle of proportionality. The Court of Justice is competent only to provide that court with the criteria for the interpretation which may enable it to make such a determination as to compatibility (see, to that effect, Case C-55/94 *Gebhard* [1995] ECR I-4165, paragraph 19 and Case C-188/09 *Profaktor Kulesza, Frankowski, Jóswiak, Orlowski* [2010] ECR I-7639, paragraph 30).
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> 36. In the circumstances of the case in the main proceedings, it must be noted that the fact that a taxable person is not in possession of the material, technical and financial resources to carry out the declared economic activity is not, in itself, sufficient to demonstrate that it is probable that the latter intends to commit tax evasion. However, it cannot be excluded that circumstances of this

> nature, corroborated by the presence of other objective elements leading to the suspicion of the taxable person's fraudulent intentions, may constitute factors that have to be taken into account as part of the overall assessment of the risk of evasion.
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> 37. Similarly, Directive 2006/112 makes no provision for a limitation on the number of applications for individual VAT identification numbers that may be made by the same person acting on behalf of different legal entities. Nor does the directive permit the inference that the transfer of control of these legal entities after they have been identified for VAT purposes constitutes an illegal activity. However, such circumstances can also be taken into account as part of an overall assessment of the risk of evasion.
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> 38. It is for the referring court to examine whether, having regard to all the circumstances of the case, the tax authority has established to the requisite legal standard the existence of sound evidence from which it may be concluded that the application for registration in the register of taxable persons subject to VAT by Ablessio might result in the misuse of the identification number or other VAT fraud.
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> 39. In light of the foregoing, the answer to the questions referred is that Articles 213, 214 and 273 of Directive 2006/112 must be interpreted as meaning that the tax authority of a Member State may not refuse to assign a VAT identification number to a company solely on the ground that, in the opinion of that authority, the company does not have at its disposal the material, technical and financial resources to carry out the economic activity declared, and that the owner of the shares in that company has already obtained, on various occasions, such an identification number for companies which never carried out any real economic activity, and the shares of which were transferred shortly after obtaining the individual number, where the tax authority concerned has not established, on the basis of objective factors, that there is sound evidence leading to the suspicion that the VAT identification number assigned will be used fraudulently. It is for the referring court to assess whether that tax authority provided sound evidence of the existence of a risk of tax evasion in the case in the main proceedings."

QUESTION 1

DISCUSSION

10. In order to determine question 1 it is necessary to consider the following issues, I have followed the same order in which they were raised by Mr Brown in his submissions:

(1) The principle in *Ablessio* is limited in its application as *Ablessio* was not a registered person and could never have been a taxable person.

(2) The reference to *Halifax* at [28] limited the application of the *Ablessio* principle solely to the prevention of fraudulent evasion by the taxpayer itself.

(3) When the decision is read in its entirety, and in particular paragraphs [25]-[28], [30] and [34]-[39], the clear implication is that the *Ablessio* judgment is limited to the deregistration of the taxpayer that has fraudulently defaulted on its VAT obligations.

(4) The case law relied upon by HMRC does not support deregistration.

(5) The application of the *Ablessio* principle to a taxpayer who has not itself fraudulently evaded VAT would be it disproportionate and undermine the fundamental principle of the fiscal neutrality of VAT.

Must be registered person

11. Mr Brown submitted that in accordance with Article 214 PVD a Member State must register a taxable person for VAT if it carries out an economic activity, [25]-[27]. Whilst he accepted that Member States have a certain discretion when they adopt measures to ensure the identification of taxable persons for the purposes of VAT, at [22], those measures must not go beyond what is necessary for the correct collection of tax and the prevention of evasion and they must not systematically undermine the right to deduct VAT and the hence the neutrality of that tax, at [30]. He submitted that it was clear from the decision that *Ablessio* was not a taxable person, could never have been a taxable person under Article 9 PVD and had never traded, this was in complete contrast to ICSL who was a taxable person and had been trading. Therefore, the principle that could be derived from *Ablessio* was of no or limited application to a taxable person and therefore HMRC could not deregister ICSL in reliance of that principle.

12. In further support of this argument, Mr Brown relied upon the use of "in particular" at [30] to support the following proposition: when the CJEU used "in particular" it was confirming that the focus of the *Ablessio* decision were persons who could never be taxable persons under Art 9 PVD.

13. Paragraphs [24]-[26] of *Ablessio* confirmed that the concept of 'taxable person' as defined in Article 9 PVD and in accordance with the well-established case law of the CJEU is to be given a broad interpretation:

> "24. Furthermore, it follows from the concept of 'taxable person', as defined in Article 9(1) of Directive 2006/112, that it covers any person who, independently, and irrespective of the place, carries out an economic activity, whatever the purpose or results of that activity.
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> 25. According to the case law of the Court, that concept should be given a broad interpretation. Any person with the intention, as confirmed by objective elements, of independently starting an economic activity, and who incurs the initial investment expenditure for those purposes must be regarded as a taxable person (see, to that effect, Case C-400/98 *Breitsohl* [2000] ECR I-4321, paragraph 34, and Case C-280/10 *Polski Trawertyn* [2012] ECR, paragraph 30).
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> 26. It follows from this case-law and from the wording of Article 213(1) of Directive 2006/112 that, not only persons who already carry out an economic activity are considered to be taxable persons eligible to apply for a VAT identification number, but also those who plan to start such an activity and who incur the initial investment expenditure for that purpose. These persons may therefore not be in a position to prove, at this early stage of their economic activity, that they already have the material, technical and financial resources to carry out such an activity."

14. The CJEU at [25] and [26] stated that, in accordance with established case law, it was not only those who had already carried out economic activity who were considered to be taxable persons but also, those like *Ablessio*, who planned to start such an activity and who may "not be in a position to prove, at this early stage of their economic activity that they already have the material, technical and financial resources to carry out such an activity".

15. In *Breitsohl* Case 400/98 at [34], referred to in *Ablessio* at [25], the CJEU stated:

> "34 In that respect, it should be recalled that a person who has the intention, confirmed by objective evidence, to commence independently an economic activity within the meaning of Article 4 of the Sixth Directive and who incurs the first investment expenditure for those purposes must be regarded as a taxable person. Acting in that capacity, he has therefore, in accordance with

> Article 17 et seq. of the Sixth Directive, the right immediately to deduct the VAT payable or paid on the investment expenditure incurred for the purposes of the transactions which he intends to carry out and which give rise to the right to deduct, without having to wait for the actual exploitation of his business to begin (Case C-37/95 *Belgian State v Ghent Coal Terminal* [1998] ECR I-1, paragraph 17; Joined Cases C-110/98 to C-147/98 *Gabalfrisa and Others v AEAT* [2000] ECR I-1577, paragraph 47)."

16. At [11] the Latvian District Administrative Court was satisfied that:

> "*Ablessio* had provide the VID with the information concerning its capacity to carry on the economic activity declared and that the accuracy of that information was not contested."

17. That decision was upheld by the Latvian Regional Administrative Court following an appeal brought by the VID. The questions referred to the CJEU were whether the refusal to register *Ablessio* for VAT solely on the ground that it did not have the material, technical and financial resources to carry out the declared economic activity was precluded by Articles 213, 214 and 273 PVD. The CJEU acknowledged at [26] that:

> "… not only persons who already carry out an economic activity are considered to be taxable persons eligible to apply for a VAT identification number, but also those who plan to start such an activity and who incur the initial investment expenditure for that purpose. These persons may therefore not be in a position to prove, at this early stage of their economic activity, that they already have the material, technical and financial resources to carry out such an activity."

18. At [27], the CJEU confirmed that Member States were precluded from refusing to assign a VAT identification number solely on the basis that the applicant is not in a position to show that it has at their disposal the material, technical and financial resources to carry out the declared activity:

> "27. Consequently, Directive 2006/112, and particularly Articles 213 and 214, preclude the tax authority of a Member State from refusing to assign a VAT identification number to applicants solely on the ground that they are not in a position to show that they have at their disposal the material, technical and financial resources to carry out the economic activity declared at the time of submitting their application for registration on the register of taxable persons."

19. The CJEU at [24]–[27] having stated that Article 9(1) PVD defined 'economic activities' very widely and, having referred at [25] to the established case law supporting that broad interpretation, concluded that an application for VAT registration could not be denied solely on the basis that the applicant could not at the preparatory stage of the economic activity prove that they had the material, technical and financial resources to carry out the economic activity. In my view, it is inherent in that conclusion and paragraph [26] that, absent the denial "solely on that basis", that *Ablessio* was a taxable person as defined by Article 9(1) PVD and met the material conditions for registration. I do not agree with Mr Brown's submission that *Ablessio* could never have been a taxable person in accordance with the definition contained in Article 9 PVD and that the decision in *Ablessio* is only of application to persons who are not a taxable person, who could never be a taxable person and has never traded.

Paragraphs in *Ablessio* relied upon by the parties

20. Mr Brown submitted that when the decision in *Ablessio* is considered in its entirety, and in particular paragraphs [28], [30], [34], [36-39], it can be discerned that the decision is only of application to the taxpayer that has itself committed the VAT fraud and cannot be extended to deregister a taxpayer that has facilitated VAT fraud.

21. Mr Watkinson submitted that that limitation cannot be correct, the principle in *Ablessio* stemmed, as the CJEU said at [28], from the wider principle in *Halifax* that preventing possible tax evasion, avoidance, and abuse is an objective recognised and encouraged by the PVD. The *Halifax* principle lead to the principle in *Kittel* which established that actual fraudulent evasion by the party claiming the input tax is not a prerequisite to refusal of the right to deduct input tax and that principle is equally applicable to deregister a taxable person who has abused their VAT registration and facilitated VAT fraud.

22. I have dealt with the points raised by the parties by considering in turn the paragraphs referred to by the parties.

Paragraph 28 - Halifax

23. At [71] in *Halifax* the CJEU stated:

> "71. Preventing possible tax evasion, avoidance and abuse is an objective recognised and encouraged by the Sixth Directive (see Joined Cases C-487/01 and C-7/02 *Gemeente Leusden and Holin Groep* [2004] ECR I-5337, paragraph 76)."

24. That objective was stated in identical terms in Case C-525/11 *Mednis* at [31] and in Case C-285/09 *R* at [36] included the word "potential"– "prevention of potential tax evasion, avoidance and abuse". In *Gemeente Leusden and Holin Groep* at [76] referred to at [71] in *Halifax* the objective was stated as "preventing possible tax evasion, avoidance and abuse is an objective recognised and encouraged by the Sixth Directive".

25. At [28], set out at [9] above, the CJEU stated that it was settled case law that the prevention of tax evasion, avoidance and abuse is an objective recognised and encouraged by the Sixth Directive and then referred, in particular, to three cases that comprised part of that settled case law. Mr Brown's argument is that, notwithstanding that clear statement and the reference to settled case law, the reference to *Halifax* at [28] confirmed that the CJEU was focused on preventing evasion and fraud as *Halifax* was concerned with arrangements that "went against the spirit of the law" and not with tax loss in a transaction chain and therefore *Halifax* was of no relevance or application to the decision in *Ablessio*.

26. In the landmark decision in *Halifax*, the CJEU having said that "Community law cannot be relied on for abusive or fraudulent ends" stated explicitly for the first time that the concept of 'abuse of law' applied to VAT and confirmed that "preventing possible tax evasion, avoidance and abuse is an objective recognised and encouraged by the Sixth Directive":

> "68. Notwithstanding that finding, it must be borne in mind that, according to settled case-law, Community law cannot be relied on for abusive or fraudulent ends (see, in particular Case C-367/96 Kefalas *and Others* [1998] ECR I-2843, paragraph 20; Case C-373/97 *Diamantis* [2000] ECR I-1705, paragraph 33; and Case C-32/03 *Fini H* [2005] ECR I-1599, paragraph 32).
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> 69. The application of Community legislation cannot be extended to cover abusive practices by economic operators, that is to say transactions carried out not in the context of normal commercial operations, but solely for the purpose of wrongfully obtaining advantages provided for by Community law (see, to that effect, Case 125/76 *Cremer* [1977] ECR 1593, paragraph 21; Case C-8/92 *General Milk Products* [1993] ECR I-779, paragraph 21; and *Emsland-Stärke*, paragraph 51).
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> 70. That principle of prohibiting abusive practices also applies to the sphere of VAT.
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> 71. Preventing possible tax evasion, avoidance and abuse is an objective recognised and encouraged by the Sixth Directive (see Joined Cases C-487/01

> and C-7/02 *Gemeente Leusden and Holin Groep* [2004] ECR I-5337, paragraph 76).
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> …
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> 74. In view of the foregoing considerations, it would appear that, in the sphere of VAT, an abusive practice can be found to exist only if, first, the transactions concerned, notwithstanding formal application of the conditions laid down by the relevant provisions of the Sixth Directive and the national legislation transposing it, result in the accrual of a tax advantage the grant of which would be contrary to the purpose of those provisions.
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> 75. Second, it must also be apparent from a number of objective factors that the essential aim of the transactions concerned is to obtain a tax advantage. As the Advocate General observed in point 89 of his Opinion, the prohibition of abuse is not relevant where the economic activity carried out may have some explanation other than the mere attainment of tax advantages.
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> …
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> 84. However, as the Court has already had occasion to observe, it is only in the absence of fraud or abuse, and subject to adjustments which may be made in accordance with the conditions laid down in Article 20 of the Sixth Directive, that the right to deduct, once it has arisen, is retained (see, in particular, Case C-400/98 *Breitsohl* [2000] ECR I-4321, paragraph 41, and Case C-396/98 *Schlossstraße* [2000] ECR I4279, paragraph 42)."

27. Advocate General Maduro in his Opinion in *Halifax* delivered on 7 April 2005, extensively considered the abuse of rights doctrine, [60]–[101]. At [77] he stated:

> "I can see no reason, in short, why the VAT rules should not be interpreted in accordance with the general principle of the prohibition of abuse of Community law."

28. That view was stated by the CJEU at [70]:

> "That principle of prohibiting abusive practices also applies to the sphere of VAT."

29. I do not agree with Mr Brown's submission. There is no indication that, by stating that "the prevention of tax evasion, avoidance and abuse is an objective recognised and encouraged by Directive 2006/112" followed by the specific reference to *Halifax*, it can be implied that the CJEU in *Ablessio* had limited the recognised objective and *Halifax* "abuse of law" principle that EU law is not to be used or relied upon for abusive or fraudulent ends solely to preventing tax evasion. That submission is not supported by the clear wording used at [28]. If Mr Brown's submission were correct that would represent a significant narrowing of the scope of *Halifax* which one would expect to be explicitly stated by the CJEU rather than having to be inferred.

No new point of law

30. Mr Watkinson submitted that it was apparent from the *Ablessio* decision that the CJEU did not consider that any new point of law was in issue. If the scope of the *Halifax* principle had been narrowed, then the CJEU would have explicitly stated any limitation or restriction on the *Halifax* principle.

31. I agree with Mr Watkinson's submission. As a matter of principle, the opinion of an Advocate General is sought in every case heard unless the CJEU decides that there is no new point of law at issue.

32. Nonetheless, legal certainty requires a consistent and clear case law. Although the case law of the CJEU does not constitute a precedent system in a formal sense, deviations from the

'well-established case law' are rare. Where the CJEU is limiting the application of a previous judgment, that limitation is clearly stated in the judgment with the reasons why it is of limited or no application to the matters before the Court. In *Cussens and Others* (C-251/16) at [38] the CJEU stated in respect of its previous decision in *Kofoed* (C-321/05):

> "Whilst, in paragraph 48 of that judgment, the Court placed emphasis on the existence of national rules relating to abuse of rights, tax evasion or tax avoidance that are capable of being interpreted in accordance with the aforesaid provision, that case-law concerns that provision of secondary legislation and is therefore not applicable to the general principle that abusive practices are prohibited."

33. No such limitation was stated in the *Ablessio* judgment. I agree with Mr Watkinson's submission that it is clear from the *Ablessio* decision that the CJEU did not consider that a new law point was in issue nor that the CJEU was deviating from the 'well-established' *Halifax* decision.

34. In light of the above, I do not accept that the reference to *Halifax* and the recognised objective of preventing evasion, avoidance and abuse at [28] provides any support for Mr Brown's submission that the CJEU in *Ablessio* was only considering fraudulent evasion by the taxpayer that has committed the VAT fraud and had limited the application of the *Halifax* doctrine of abuse in the context of VAT registration.

Paragraph 30

35. Mr Brown submitted that the words "in particular" at [30], set out at [9] above, must mean that the measures were aimed at "undertakings whose activity, and consequently their status as taxable persons, is purely fictious", i.e. non-taxable persons. I disagree. The use of "in particular" after "prevent the misuse of identification numbers", in my view, confirms that measures to prevent the misuse of identification numbers are not limited to "fictious" taxable persons and are applicable to all taxable persons but that the Member State should, in particular, take such measures against "fictious" taxable persons. The use of "in particular" indicates that such measures should be applied especially to "fictious" taxable persons but not to the exclusion of taxable persons. Such a limitation would restrict the Member State's ability to take measures to ensure the correct collection of tax and prevent evasion. Accordingly, a Member State can legitimately take measures to prevent taxable persons misusing their registration number.

36. Mr Brown submitted that it was relevant that the CJEU had referred to measures to prevent the "misuse of identification numbers" rather than "fraudulent use of identification numbers". The OED defines "misuse" as: "*wrong or improper use; misapplication; an instance of this.*" The use of the word "misuse", in my view, indicates that the right to registration granted by EU law must not be used contrary to its purpose i.e. in an abusive or fraudulent manner. A plain reading of this paragraph points to the opposite conclusion suggested by Mr Brown. The CJEU was not limiting the measures that a Member State can take to combat fraudulent evasion by a taxable person in the manner submitted by Mr Brown, but rather set out the measures that a Member State can legitimately take to prevent the misuse (in all its forms) of VAT registration. The CJEU then stated the limits of such measures: those measures must be proportionate to the objective of preventing evasion and not systematically undermine the VAT system. The limitation imposed in this paragraph, in my view, is that the measures to prevent misuse of VAT registration must be proportionate to the objective of preventing evasion and not undermine the right to deduct VAT and not, as suggested by Mr Brown, limited to the prevention of misuse of VAT registration by taxpayers who themselves were intending to use or using their VAT registration for fraudulent purposes. I cannot see that such a limitation can be inferred from the wording in that paragraph.

Paragraph 34

37. Mr Brown submitted that it could be inferred from the use of "assigned to that taxable person will be used fraudulently" in [34], set out at [9] above, that the CJEU was only referring to deregistration of a taxpayer that has itself committed the VAT fraud. I do not accept that such an inference can be made. There is no suggestion that the CJEU, following the earlier references to *Halifax* at [28] and 'misuse' at [30] and having stated the evidential and objective requirements that must be satisfied for it to be proportionate to refuse registration, then limited the refusal to identify a taxable person by a VAT registration number to a taxable person itself committing the fraud. Such a limitation would, in my view, restrict the recognised objective of preventing tax evasion, avoidance and abuse contrary to that earlier stated objective at [28].

Paragraph 36

38. The CJEU in this paragraph referred to the facts of the appeal before it, set out at [9] above.

39. Mr Brown submitted that the words "the latter intends to commit tax evasion" in the first sentence supports the interpretation that *Ablessio* must be limited to the deregistration of the taxpayer that had committed the VAT fraud. However, in the second sentence the Court stated that "it cannot be excluded that circumstances of this nature, corroborated by the presence of other objective elements leading to the suspicion of the taxable person's fraudulent intentions, may constitute factors that have to be taken into account as part of the overall assessment of the risk of evasion." The reference in the second sentence is to "fraudulent intentions" as opposed to "intends to commit tax evasion", is in my judgement, of wider application and does not, as Mr Brown submitted, limit the application of *Ablessio* to the deregistration of the taxpayer that has committed the VAT fraud.

40. The CJEU stated that the absence of relevant resources to carry out the economic activity was not in itself sufficient to demonstrate that it is probable that the taxpayer intends to commit tax evasion but that those circumstances may be relevant and lead to the suspicion of fraudulent intentions when corroborated by objective evidence. Where objective evidence corroborating the fraudulent intentions of the taxable person is available, I cannot see that the interpretation that Mr Brown suggests would find favour with a Court or Tribunal, indeed it would be contrary to the stated intention of interpreting the PVD in a manner to make it more difficult to carry out VAT fraud (see *Kittel* at [58]).

Paragraph 37

41. Mr Brown submitted that the reference at [37], set out at [9] above, to the number of applications for registration and transfer of control by the registered taxpayer as part of the assessment of the risk of evasion provides a clear inference that the assessment of fraud relates to the VAT number assigned to that taxable person and not that of another taxable person. I do not agree that such an inference can be drawn from that paragraph. One of the reasons given at [12] for the denial of registration by the Latvian authorities was that the owner of the shares had historically obtained an identification number for companies which never carried out any real economic activity and, immediately after registration, were transferred to other persons who did not possess sufficient funds to provide the share capital, indicating that the Latvian tax authority suspected that the identification number would be used fraudulently by the new owner.

42. The CJEU, in determining the circumstances of the case before it, (see [36]), was required to consider those facts and whether the Latvian authorities were justified in refusing registration on that basis. I do not accept that consideration of the facts of the case before it by the CJEU provides the clear inference that Mr Brown seeks to rely upon, the CJEU merely confirmed

that such facts can be taken into account as part of the "overall assessment of the risk of evasion".

Paragraph 38

43. Mr Brown submitted that it can be inferred from the use of the word "misuse" in paragraph [38], set out at [9] above, that the CJEU is addressing VAT fraud by that person as the words "might result in the misuse of the identification number or other VAT fraud" are used as opposed to VAT fraud. Mr Watkinson submitted that it was clear that the CJEU was not confining itself in the manner suggested by Mr Brown and this was apparent from the use of "might result in the misuse of the identification number or other VAT fraud." In [38] the CJEU again used the word "misuse" that was earlier used at [30]. As stated at paragraph 37 above, the use of "misuse" in my view indicates that a taxable person is using rights conferred upon them by EU law contrary to its purpose i.e. in an abusive or fraudulent manner.

44. The use of the words "misuse of the identification number or other VAT fraud" in my view indicates, on a plain reading of the wording, that the CJEU was using "or" to refer to two distinct concepts and is not limiting itself to VAT fraud by that person. I do not consider that the inferred limitation that Mr Brown seeks to rely upon is supported by the plain wording of [38].

Paragraph 39

45. In this paragraph, set out at [9] above, the CJEU provided its answer to the question that had been referred.

46. Mr Brown submitted that the reference to "the VAT number assigned will be used fraudulently" confirmed that the CJEU had limited the measures that a Member State can take to prevent fraud or abuse to the party that was itself using their VAT registration fraudulently. The answer to the referred question began by stating "In light of the foregoing" which confirmed that the answer that followed relied upon and was dependent upon the principles and jurisprudence stated and identified in the preceding paragraphs. I do not accept Mr Brown's submission that, in providing its answer to the referred question, the CJEU restricted the measures that a Member State can take to prevent the misuse of VAT identification numbers solely to the prevention of evasion by taxable persons who were intending to use or using their VAT registration for fraudulent purposes. If that submission were correct that would limit the application of principle in *Ablessio* when that limitation is not stated nor explained in the preceding paragraphs.

Conclusion on Ablessio paragraphs

47. Having considered all the paragraphs in *Ablessio* that the parties relied upon I do not accept Mr Brown's submission that, when the decision is read in its entirety, it can be inferred that the measures that a Member State can legitimately take to prevent the misuse of VAT identification numbers to further the objective of preventing tax evasion, avoidance and abuse are limited solely to the prevention of evasion by taxable persons who are intending to use or are using their VAT registration for fraudulent purposes. If that proposition were correct, then the reference to *Halifax* at [28] would serve no useful purpose and would represent a significant narrowing of the scope of the *Halifax* doctrine of abuse.

48. The CJEU in *Ablessio* set out at [34] and [38] the requirements that a tax authority must establish in order for the national court to be satisfied that "having regard to all the circumstances of the case" the national tax authority has established to the "requisite legal standard" "based on sound evidence giving objective grounds for considering that it is probable that the VAT identification number assigned to that taxable person will be used fraudulently." Those requirements set a high threshold that the tax authority has to overcome to discharge the

burden of proof and satisfy the national court that it would be proportionate to refuse to register a taxable person or deregister them.

49. If Mr Brown's submissions were correct, then the establishment by the national tax authority to the requisite legal standard of sound evidence giving objective grounds for the probable fraudulent or abusive use of a VAT registration would have to be disregarded because the evidence related to a taxable person who was not directly using its registration number fraudulently but was using it abusively by facilitating VAT fraud.

50. I agree with Mr Watkinson that interpretation cannot be correct and would be contrary to the objective recognised in the PVD and established EU case law of preventing evasion, avoidance and abuse and that EU law is not to be used or relied upon for abusive or fraudulent ends.

Case law relied upon by HMRC does not support deregistration

51. HMRC relied upon two High Court decisions and a decision of the Tribunal in support of their proposition that the principle in *Ablessio* did not only apply when the VAT registration was being used directly for fraudulent purposes but also to those who were using or intending to use their VAT registration to facilitate VAT fraud. Decisions of the High Court are binding on me. Mr Brown submitted that the decisions can be distinguished on the basis of their facts or mistaken reliance on facts. The first is the decision of Robin Purchas QC sitting as a Deputy High Court Judge in *Thames Wines Ltd v HM Revenue & Customs* [2017] EWHC 452 (Admin) ("*Thames Wines*").

Thames Wines

52. *Thames Wines* was a claim for permission to apply for judicial review of HMRC's decision to deregister the claimant for VAT in reliance on the *Ablessio* decision. Mr Brown submitted that *Thames Wines* is not authority for HMRC's proposition as the claim for judicial review was made on the basis that the action by HMRC to deregister the claimant was unlawful, [6], the case was that all the transactions were fraudulent, [35], the second part of the Deputy High Court Judge's decision at [43] was wrong as the test in *Halifax* was different to that in *Ablessio* and he had conflated *Halifax* and *Kittel* to reach his decision.

Claim was that deregistration was unlawful

53. It is clear from the decision that, despite the fact that the claim for judicial review was made on the basis that HMRC's decision to deregister the claimant was unlawful, the application of the *Ablessio* principle was the subject of detailed submissions which were considered by the Deputy High Court Judge when deciding the claim for judicial review. Accordingly, I do not accept Mr Brown's submission that the decision can be distinguished for the reason that the claim for judicial review was made on the basis that HMRC's decision to deregister the claimant was unlawful.

All the transactions were fraudulent

I accept Mr Brown's submission that it was, on the balance of probabilities, likely that all the transactions were fraudulent, (see [35] which refers to paragraph 87 of Officer Musson's witness statement), however I do not accept that as a basis for distinguishing the decision. That would be to ignore that the submissions made by Mr Bedenham, for the claimant, were that the principle in *Ablessio* only applied to the situation where the VAT registration was being used directly by the taxpayer itself for fraudulent purposes, [14]. That was the very same argument that was advanced by Mr Brown in this hearing and was rejected.

Conflation of Halifax and Kittel

54. I do not accept Mr Brown's submission that it is apparent from the decision that the Deputy High Court Judge had conflated the principles in *Halifax* and *Kittel* to arrive at his

decision. The second part of his decision at [43] was the application of the *Halifax* doctrine that he had referred to at [12]: that the PVD should be interpreted in a way that prevents VAT fraud or abuse in accordance with the common objective.

55. Accordingly, I do not accept Mr Brown's submissions that the decision in *Thames Wines* can be distinguished. I accept HMRC's submission that the decision in *Thames Wines* is authority for the proposition that the principle in *Ablessio* did not only apply when the VAT registration was being used directly for fraudulent purposes but also to those who were using or intending to use their VAT registration to facilitate VAT fraud.

Ingenious

56. The second High Court authority that HMRC relied upon was *Ingenious Construction Ltd, R (On the Application Of) v The Commissioners for HM Revenue and Customs* [2020] EWHC 2255 (Admin) ("*Ingenious*"). *Ingenious* was an application for interim relief and permission to apply for judicial review of HMRC's decision to refuse to reinstate the claimant's VAT registration pending an appeal to the Tribunal. HMRC had cancelled the claimant's VAT registration on the basis that it was being used to facilitate fraud and issued the claimant with an assessment for disallowed input tax

57. Sir Ross Cranston, sitting as High Court Judge, rejected as "not arguable" the submission that HMRC did not have power to cancel a VAT registration because of fraudulent use. He stated that the power to deregister was derived from the EU doctrine of abuse and, in accordance with the PVD, Member States had a general power to act proportionately against the abuse of VAT registration where there was sound evidence giving objective grounds to do so, *Ablessio* followed. At [45] and [50], he confirmed that under the well accepted principles, there is no need for national implementing legislation prohibiting abuse in the context of the PVD. At [48] he stated that the power to deregister extended beyond cases where registration was being directly used for fraudulent purposes to cases where it could be shown by reference to objective factors that taxpayer's VAT registration was being used to facilitate fraud or abuse and the taxpayer knew or should have known of the connection with fraud, *Thames Wines* applied.

58. Mr Brown submitted that *Ingenious* was not authority for HMRC's proposition as the reliance on the quotation taken from the decision of Simler J (as she then was) in *R (on the application of Tidechain) v Commissioners for HM Revenue and Customs* [2015] EWHC 4031 (Admin) ("*Tidechain*"*)* at [46] was wrong as it was not the ratio of *Ablessio*, the reliance placed upon *Manhattan Systems Ltd v Revenue and Customs Commissioners* [2017] UKFTT 862 (TC*) (*"*Manhattan*"*)* at [47] was misplaced and Sir Ross Cranston had treated the deregistration and the input tax denial as the same case when the challenge was against deregistration only and not input tax denial, [6]. I do not accept Mr Brown's submissions.

Ablessio principle limited

59. I have already rejected the limitation that Mr Brown sought to impose on the principle derived from *Ablessio*. That limitation was rejected in *Thames Wines* and similarly rejected in *Ingenious* at [50].

Reliance on Tidechain

60. Mr Brown submitted that the reliance at [46] that Sir Ross Cranston placed upon Simler J's summary in *Tidechain* made the decision in *Ingenious* on that point flawed as it was not the *ratio* of the decision in *Ablessio*. I do not accept that submission. In my view, Simler J's summary at [21] in *Tidechain* correctly stated the principle established in *Ablessio*. At [17(i-ii)] and at the repeated [17(i-ii)] Simler J set out paragraphs [28], [30], [34] and [38] of *Ablessio* that contained the *ratio* and at [21] of her decision summarised what *Ablessio* established:

> "21. Ablessio SIA established that where there is sound evidence based on an overall assessment of all the circumstances of the case and evidence gathered, giving objective grounds for considering that it is probable that a person's existing registration number is being used fraudulently then the VAT registration may be cancelled. It is then for domestic courts to examine whether, having regard to all the circumstances of the case, the tax authority has established to the requisite standard the existence of such sound evidence.
>
> CF 17 above"

61. Immediately after the summary at [21], "CF 17 above" is stated referring the reader to [17] where Simler J had identified the paragraphs containing the *ratio* for the principle established in *Ablessio*.

62. At [47], Sir Ross Cranston confirmed that he had considered whether Simler J's summary was flawed before adopting that summary:

> "Albeit that the arguments of unlawfulness Mr Young advanced were not before Simler J, it would be difficult for me to disregard her considered conclusion unless I thought it was arguably flawed. I do not."

63. I do not accept that the adoption by Sir Ross Cranston of Simler J's summary in *Tidechain* had the effect, as Mr Brown submitted, of rendering the decision in *Ingenious* flawed on that point.

Reliance placed upon Manhattan in Ingenious

64. Mr Brown submitted that the reliance placed upon the Tribunal decision in *Manhattan* at [47] in *Ingenious* was misplaced as all that decision confirmed was whether the jurisdiction of the Tribunal was appellate or supervisory. At [44] Sir Ross Cranston stated: "In my view it is not arguable that HMRC do not have power to deregister.", at [44]-[46] set out the reasons for his conclusion and at [47] stated:

> "I am fortified in my conclusion by the decision of Robin Purchas QC, sitting as a deputy High Court judge in *Thames Wines Ltd v Revenue and Customs Commissioners [2017] EWHC 452 (Admin)*, and that of FTT Judge Barbara Mosedale in *Manhattan Systems Ltd v Revenue and Customs Commissioners [2017] UKFTT 862 (TC) ("Manhattan")*, [42]."

65. I accept Mr Brown's submission that, at [42] in *Manhattan*, Judge Mosedale was considering whether the jurisdiction of the Tribunal was appellate or supervisory; however, that deliberation was in the context of HMRC's submission that the right to deregister the Appellant was a power to be read into VATA where HMRC had concluded that the Appellant had used or thought likely that it would use its VAT registration fraudulently. In my view, it is apparent from [44]–[47] in *Ingenious*, that Sir Ross Cranston had already reached his conclusion on the lawfulness point and reference was made to the decisions in *Thames Wines* and *Manhattan* as indicating support for the conclusion that he had reached.

Deregistration and input tax denial treated as same case

66. Mr Brown submitted that Sir Ross Cranston had treated the deregistration and input tax denial as the same case when the judicial review challenge was against the decision of HMRC to "refuse to reinstate its VAT registration", at [1]. Mr Watkinson submitted that the claimant had, on the same day it was refused reinstatement of its VAT registration, also been denied the right to claim input tax and that, in effect, the *Kittel* and deregistration cases were effectively considered as the same case. I do not accept Mr Brown's submission that Sir Ross Cranston had treated the deregistration and input tax denial as the same case.

It is apparent from paragraphs [7] and [9] of the decision that the evidence and reasons relied upon by HMRC to deregister the claimant were in all material respects the same evidence and reasons relied upon to deny the right to deduct input tax. The evidence and reasons relied upon by HMRC were accepted by Sir Ross Cranston as supporting both the decision to deregister and the input tax denial. Having concluded that *Ablessio* established that HMRC had a general power, derived from the *Halifax* doctrine of abuse, to act proportionately against the abuse of VAT registration so long as there was sound evidence giving objective grounds for their conclusion, see [44]-[47], he relied upon *Thames Wines* as authority:

> "48. Despite being a decision on interim relief and permission, *Thames Wines* [2017] EWHC 452 (Admin) is also authority that deregistration in accordance with Ablessio extends beyond situations where a VAT registration is itself being directly used for fraudulent purposes to those where it is being used as part of a chain which includes other suppliers who are acting fraudulently. In this regard it seems to me that the best approach is to ask whether the taxpayer who is not itself fraudulent is nonetheless facilitating fraud or abuse as a participant in the *Kittel* sense of having knowledge or the means of knowledge of a connection with fraud."

67. The reference to "in the *Kittel* sense", does not support Mr Brown's submission. Sir Ross Cranston referred to *Kittel* to confirm that in order to apply the *Ablessio* principle, it had to be established that the taxpayer had knowledge or the means of knowledge of a connection with fraud.

68. Accordingly, I do not accept Mr Brown's submissions that the decision of the High Court in *Ingenious* should be distinguished. I agree with Mr Watkinson's submission that the decision is binding on me and authority for the proposition that the principle in *Ablessio* applies beyond a party who is himself using his VAT registration directly for fraudulent purposes to a party using its VAT registration to facilitate fraud.

Millennium Energy Trading

69. HMRC relied upon the Tribunal decision in *Millennium Energy Trading Ltd v Revenue & Customs* [2018] UKFTT 633 (TC) ("*MET*"). In that decision, the Tribunal (Judge Andrew Scott and Mrs Sonia Gable) found that the taxpayer should have known that its transactions were connected with the fraudulent evasion of VAT and that was sufficient to deregister the taxpayer in reliance upon the *Ablessio* decision, [at 100]. Mr Brown challenged the reliance upon *MET* for the following reasons: the decision is not binding on this Tribunal; the Appellant did not appear nor was it represented, and *MET* had been registered for VAT despite what was said at [97] and "probable that a trader …" at [98] was not what was said in *Ablessio.*

70. It is, of course, accepted that the decision in *MET*, as a decision of the Tribunal, is not binding on me and is merely persuasive but may be considered when making my decision and its reasoning and conclusions followed.

71. *MET* was an appeal against HMRC's decisions to: (1) cancel *MET's* registration for VAT on the basis that it had used or intended to use its registration for fraudulent and abusive ends, (2) the denial of VAT input tax credit on the purchase of metals in the period June 2013 to July 2013 and (3) assessments to VAT for the periods in which input tax credit was denied. The Tribunal considered the non-attendance of the Appellant, Mr George (the sole director and shareholder of MET), and its lack of representation, at [8], and provided directions for the conduct of the hearing to ensure that the Appellant was not disadvantaged by its non-attendance, at [10]. Following the hearing, the Tribunal received submissions from Mr George) which were considered by the Tribunal in reaching its findings and decision, at [31]. The Tribunal found at [81] that *MET* should have known of the connection to fraud and dismissed the appeal against the input tax denial. At [97], the Tribunal set out HMRC's submission that,

whilst *MET* satisfied the requirement to be registered for VAT that right did not exist or remain when the principal aim of the registration was to abuse the VAT system and, at [98], stated that HMRC's submission was supported by the decision in *Ablessio* which made clear that where it is on objective grounds probable that a trader is involved in VAT fraud, that trader can be denied registration. The Tribunal, at [100] confirmed that HMRC's reasons for deregistering *MET* were in all material respects identical to those for the Kittel denial and the deregistration decision taken on the basis on *Ablessio* was correct.

72. I do not accept Mr Brown's submissions that no reliance should be placed upon *MET* and accept HMRC's submission that the decision in *MET* is persuasive authority that where there is sound evidence giving objective grounds (per [34] and [38] of *Ablessio*) that the taxpayer should have known that its transactions were connected with the fraudulent evasion of VAT that is sufficient to deregister the taxpayer in reliance upon the *Ablessio* decision.

Conclusion on case law relied upon by HMRC

73. I do not accept Mr Brown's submissions that the High Court decisions in *Thames Wines* and *Ingenious* can be distinguished on their facts or factual inaccuracies and are not binding on me. I accept HMRC's submission that they are authority for the proposition the principle in *Ablessio* is not limited to the party who is himself fraudulently evading VAT but extends to a party that abuses their VAT registration by facilitating VAT fraud committed by another party.

No statutory authority to deregister

74. Mr Brown submitted that there was no statutory authority for HMRC to deregister a taxpayer who was facilitating the VAT fraud of another party. That same submission was made in *Ingenious* by the claimant's Counsel, Mr Young, at [41].

75. That same submission was rejected as not arguable by Sir Ross Cranston in *Ingenious*:

> "44. In my view it is not arguable that HMRC do not have power to deregister. Schedule 1 paragraphs 13(2) and 13(5) of the Value Added Tax Act 1994 gives HMRC the power to cancel a VAT registration when satisfied that a registered person has ceased to be registrable and is not entitled to be registered. The power to cancel a VAT registration in the particular case of fraudulent use derives from the Community law doctrine of abuse, explained in the registration context in *Case C- 527/11, Ablessio*. The issues in that case raised questions different from the present, but the court recognised that in accordance with the Sixth VAT directive 2006/112 the tax authorities of a Member State had a general power to act proportionately against the abuse of VAT registration so long as there was sound evidence giving objective grounds for their conclusion: [28], [30], [34], [38].
>
> 45. Under well accepted principles, there is no need for national implementing legislation of the principle prohibiting abuse in the context of the Sixth VAT directive: *Halifax plc v Commissioners of Customs and Excise Case* C-255/02, Advocate-General Maduro's Opinion, [62]-[82]; *Pendragon Plc v Revenue and Customs Commissioners* [2015] UKSC 37, [2015] 1 WLR 2838, [27], per Lord Sumption (with whom Lords Neuberger, Reed, Carnwath and Hodge agreed); *Mobilx Ltd (In Administration) v Revenue and Customs Commissioners* [2010] EWCA Civ 517, [2010] STC 1436, [49], per Moses LJ (with whom Carnwath LJ and Sir John Chadwick agreed)."

76. The decisions in *Ingenious* and the other cases cited at [45] confirm that there is no need for national legislation implementing the principle prohibiting abuse contained in the Sixth VAT directive and the right to deregister is read into Sch 1 of VATA. Accordingly, I reject Mr Brown's submission that there is no lawful basis for HMRC to deregister a taxpayer who is facilitating the VAT fraud of another party.

Deregistration would be disproportionate

77. Mr Brown submitted that to extend the *Ablessio* principle and deregister a taxpayer such as ICSL who had not itself fraudulently evaded VAT and has carried out taxable transactions untainted by fraud would be disproportionate and undermine the fundamental principle of fiscal neutrality of VAT. Whilst he accepted that Member States have a discretion it "must not go beyond what is necessary for the correct collection of the tax and the prevention of evasion, and they must not systematically undermine the right to deduct VAT, and hence the neutrality of that tax", at [30] *Ablessio*. Mr Watkinson submitted that deregistering a taxpayer who has not itself fraudulently evaded VAT but has facilitated VAT evasion would reflect the recognised objective of preventing tax evasion, avoidance and abuse in the VAT system and not be disproportionate.

78. Mr Brown relied upon *GST - Sarviz AG Germania* C-111/14 ("*GST*") at [32] in support of the proposition that the common system of VAT ensures that all economic activities, whatever their purpose or results, provided that they are, in principle, themselves subject to VAT are taxed in a neutral way.

79. I do not agree that the decision in *GST* supports Mr Brown's submission that deregistering a taxpayer would undermine the fiscal neutrality of VAT. The CJEU in *GST* at [34], qualified that statement and confirmed that the measures that a Member State adopts to ensure the correct levying and collection of VAT and the prevention of fraud must not go further than is necessary to obtain that objective and may not be used in such a way that would have the effect of undermining the neutrality of VAT.

80. The CJEU in *Ablessio* similarly stated that the measures that a Member State takes to prevent fraud must not go beyond what is necessary and systematically undermine the neutrality of VAT (see [30] and [34] of *Ablessio* set out at [9] above).

81. Mr Brown submitted that *Volkswagen AG* [2018] EUECJ C-533/16 ("*Volkswagen*") at [37]-[39] confirmed that, by carrying out taxable transactions untainted by fraud, ICSL should retain its VAT registration and deregistering ICSL would prevent it claiming input tax on its purchases which is intended to relieve the operator entirely of the burden of the VAT due and, in principle, cannot be limited. The dispute in *Volkswagen* arose after a partial refusal by the Slovak taxing authorities of an application for a refund of VAT that had been charged several years after the initial delivery of the supplied goods to *Volkswagen*.

82. As rightly acknowledged by Mr Brown, the right to deduct may, in principle, not be limited but at [48] the CJEU set out the circumstances when that right can be limited:

> "48 In addition, under Article 273 of Directive 2006/112, the Member State may impose other obligations which they deem necessary for the correct collection of VAT and for the prevention of evasion. The prevention of tax evasion, avoidance and abuse is a recognised objective and is encouraged by that directive. However, the measures which the Member States may adopt under Article 273 of that directive must not go further than necessary to attain such objectives. Therefore, they cannot be used in such a way that they would have the effect of systematically undermining the right to deduct VAT and, consequently, the neutrality of VAT (see, to that effect, judgment of 28 July 2016, *Astone*, C-332/15, EU:C:2016:614, paragraphs 49 and 50 and the case-law cited)."

83. Paragraph [48] of *Volkswagen* is, to all intents and purposes, identical to paragraph [30] in *Ablessio.* In both *Volkswagen* and *Ablessio* the CJEU restated the principle that the measures that a Member State can legitimately take to prevent tax evasion, avoidance and abuse must

not go further than necessary to attain such objectives and must not systematically undermine the right to deduct VAT and the neutrality of that VAT.

84. I do not accept Mr Brown's submission that ICSL's right to be registered for VAT cannot, in principle, be limited because it carried out taxable transactions untainted by fraud. *Volkswagen*, relied upon by Mr Brown, does not support that submission.

85. At [34] and [38] in *Ablessio* (set out at [9] above), the CJEU set out what was required in order for it to be considered proportionate for the national authority to refuse registration or deregister a taxable person.

86. Mr Watkinson submitted that the right to deduct input tax on transactions is dependent upon the taxable person being VAT registered, if the right to be registered or remain registered is denied in accordance with the *Ablessio* principle, the denial of the right to deduct input tax on "untainted" transactions is the inevitable consequence of the taxable person's use of its VAT registration for abusive or fraudulent ends. Mr Brown submitted that such a step would place ICSL at a severe competitive disadvantage as new or existing customers would not purchase its services, it could no longer claim input tax on other purchases and it would be stigmatised by the removal of its VAT registration. I agree with Mr Watkinson that deregistering ICSL would be a consequence of facilitating VAT fraud but I do not accept that deregistration would be the "inevitable consequence". As was made clear at [34] and [38] in *Ablessio*, the refusal or removal of the right to registration is not an "inevitable consequence" of the taxable person's use of its VAT registration for abusive or fraudulent ends, such refusal or removal of the right to registration would only be considered proportionate by the Tribunal following an "overall assessment of all the circumstances of the case and the evidence gathered".

Proportionate remedy

87. Mr Brown submitted that the proportionate remedy where a taxable person is found to have facilitated VAT fraud would be to deny the taxable person its input tax and impose penalties, not deregistration. Mr Watkinson submitted that that would provide a rather odd conclusion as it would allow a taxable person who had facilitated VAT fraud to remain registered and allow it to facilitate further VAT fraud. Mr Watkinson submitted that in *Thames Wines* the claimant had made exactly the same submission as Mr Brown and that submission was rejected as unarguable.

88. In *Thames Wines* the claimant's Counsel, Mr Bedenham, submitted at [6]:

> "deregistration was not proportionate because it went beyond what was necessary for the object of preventing VAT evasion"

and at [14]:

> "The sanction must be proportionate which means that it is necessary in the absence of any less severe alternative."

89. Having considered those submissions Robin Purchas QC held at [45]:

> "45. On proportionality and necessity, I do not consider that it is arguable that a sanction necessarily becomes disproportionate because there exists an alternative form of lesser sanction. The question has to be determined in the light of the objective and effectiveness. I do not consider it is arguable that the court in *Ablessio* (paragraph 30) in referring to what was necessary for the prevention of evasion, was intending anything different by way of approach. On that basis I do not consider that here the reason for the decision of the defendant is arguably disqualified as a basis for deregistration, having regard to the effect of the judgment in *Ablessio*."

90. In reaching his conclusion at [45], the Deputy High Court Judge, Robin Purchas QC, held that it was not arguable, having regard to [30] in *Ablessio*, that the existence of a lesser sanction meant that deregistration would be disproportionate for the prevention of evasion. On the basis of the evidence before him and having regard to the *Ablessio* decision, he concluded that deregistration of the claimant was proportionate. I agree with the conclusion of the High Court, that it is not arguable that deregistering a taxpayer becomes disproportionate merely because there exists an alternative lesser sanction. As stated at [34] and [38] in *Ablessio,* it is for the national court to determine whether deregistering a taxpayer is considered proportionate to the objective of preventing evasion, such a decision must be based on the overall assessment of all the circumstances of the case and the evidence gathered and presented before it.

Conclusion on question 1

91. For all the above reasons I find that the principle in *Ablessio* applies both to a party that has itself fraudulently defaulted on its VAT obligations and a party that has facilitated the VAT fraud of another party.

QUESTION 2

Discussion

92. Question 2 was in three parts:

> If the principle in *Ablessio* does apply to a party who has facilitated the VAT fraud of another party, is simple facilitation sufficient, or must it additionally be proved that:
>
> (a) the facilitating party was itself dishonest; or
>
> (b) the facilitating party knew that it was facilitating the fraud, and/or
>
> (c) the facilitating party should have known that it was facilitating the fraud?

Simple participation

93. It was common ground that simple participation as a supplier/customer in a transaction would not be sufficient to engage the principle in *Ablessio* just as it would not be sufficient for refusal of the right to deduct input tax under *Kittel*.

Facilitation

94. Mr Watkinson relied upon the Shorter OED definition of "facilitate". That definition stated: "*1. Make easy or easier, promote, help forward (an action, result, etc.) 2. Lessen the labour of, assist a person."* Mr Brown did not disagree with that definition or advance an alternative definition. Mr Watkinson submitted that the Shorter OED definition of facilitation requires something more than mere participation in a transaction that is part of a fraud since it implies positive assistance. He relied upon *Kittel* which established that where a party knew or should have known that its transaction was connected with the fraudulent evasion of VAT the national authority can refuse the right to deduct input tax. Therefore, actual fraudulent evasion by the party claiming the input tax is not a prerequisite to refusal of the right to deduct input tax (see *Kittel* at [51]-[59]).

95. I accepted at paragraph 34 above that the reference to *Halifax* at [28] in *Ablessio* was not limited in the manner suggested by Mr Brown. I agree with Mr Watkinson that the rationale behind *Kittel* that those who are positively assisting/facilitating the fraudsters in a VAT fraud are treated as participants and denied the right to deduct input tax is equally applicable to deregister a taxable person who is using their VAT registration abusively to facilitate VAT fraud. The decision in *Ablessio,* considered in detail at [20]-[50] above, in my view supports that conclusion and would further the recognised objectives of preventing tax evasion, avoidance and abuse and prevent rights granted under EU law being used or relied upon for abusive or fraudulent ends.

Simple facilitation

96. Mr Watkinson submitted that simple facilitation would be sufficient for the application of the *Ablessio* principle and would accord with the extant CJEU jurisprudence of furthering the purpose of the broad anti-abuse/evasion principle in *Halifax*. A simple facilitation test would not establish a system of strict liability as *Ablessio* requires that there be sound evidence giving objective grounds for considering that it is probable that the VAT registration will be used to facilitate or had been used to facilitate fraud. Mr Brown submitted that simple facilitation without more was not sufficient reason to deregister a taxpayer. He submitted, there was a clear analogy between deregistering a taxable person and it losing its right to claim input tax. In respect of the latter, refusing that right without there being a requirement to prove that the taxable person knew or should have known, would establish a system of strict liability for deregistration and go beyond what is necessary to protect the public exchequer, (*Bonik* at [41] and [42]).

97. In *Bonik* the CJEU considered the denial of the right of deduction where the taxpayer did not know and could not have known that it was participating in a transaction connected with fraud and rejected the denial by the Bulgarian tax authorities on the basis that it would go beyond what is necessary to protect the exchequer. The CJEU confirmed, by reference to *Kittel* and other established EU case law, that denial of the right of deduction required it to be established on the basis of objective grounds that the taxable person has actual or implied knowledge that it was participating in a transaction connected with fraud otherwise a system of strict liability would be established and go beyond what is necessary to preserve the exchequer's rights.

98. I agree with Mr Brown that simple participation without more would not be sufficient to deregister a taxable person when applying the *Ablessio* principle. In *Bonik*, the CJEU restated that denial of the right of deduction required it to be established on the basis of objective grounds that the taxable person has actual or implied knowledge that it was participating in a transaction connected with fraud otherwise a system of strict liability would be established and go beyond what is necessary to preserve the exchequer's rights. The test of "simple facilitation" proposed by Mr Watkinson for deregistering a taxable person would mean that HMRC would only have to establish a connection between the taxable person and the party committing the VAT fraud for the taxable person to be deregistered, that proposition was rejected by the Court in *Bonik*.

99. Having concluded that simple facilitation is not sufficient to apply the principle in *Ablessio* it is now necessary to look at question 2 (a)-(c).

2(a) The facilitating party was itself dishonest

100. Mr Brown submitted that where a VAT fraud is committed by a taxable person himself, the concepts of economic activity and supply by a person acting as a taxable person as such are not met, *Kittel* at [53]. Therefore, in situations where VAT is evaded by another VAT registered person, in order for paragraph [53] of *Kittel* to apply to ICSL it must be proved that it committed the VAT fraud i.e. it caused the defaulting trader's failure to account for VAT and it was dishonest applying the test in *Ivey v Genting Casinos (UK) Ltd (t/a Crockfords*) ("*Genting*") [2017] UKSC 67. In effect, ICSL would still be committing fraud by that VAT registration number, not its own; however, it would then be using its own VAT number for fraudulent purposes by then purchasing directly from that third party. Mr Watkinson submitted that dishonesty is not required to apply *Kittel* to deny a taxpayer the right to deduct input tax, per *The Commissioners for HM Revenue and Customs v Citibank NA. E Buyer UK Limited* [2017] EWCA 1416 (Civ) ("*Citibank*") at [90]-[92], so there is no sensible reason why dishonesty would be required to deregister a taxpayer when applying the *Ablessio* principle. Just as the

requirement to prove dishonesty would place a significant and unwarranted hurdle in the path of a taxing authority seeking to deny the right to deduct input tax, so would it place a similar hurdle in the path of the same taxing authority seeking to refuse VAT registration/deregister a taxpayer. Therefore, there is no basis for Mr Brown's assertion that proof of dishonesty is required for the *Ablessio* principle to be applied.

101. I agree with Mr Brown that, where HMRC have alleged that the conduct of the taxable person was dishonest or fraudulent, those allegations must be specifically pleaded, particularised and proved as it would have to be in civil proceedings in the High Court (see *Citibank* at [85] and [90(iii)]). However, HMRC's case is not that ICSL was itself directly using its VAT registration fraudulently or dishonestly but that it had facilitated VAT fraud committed by someone else. The decision of the Chancellor in *Citibank* at [64] stated that the underlying 'abuse of law' approach confirmed that there could be knowledge without dishonesty under the first limb in *Kittel* and the taxpayer's abuse of its legal rights would not involve dishonesty in every case. Therefore, when HMRC sought to deny the right to reclaim input tax under the *Kittel* test they were not required to allege that the taxpayer had acted dishonestly and fraudulently in relation to the transactions to which it was a party.

102. In my judgement, I cannot see that there would be any rational justification for requiring dishonesty to be proved to deregister a taxable person for facilitating VAT fraud but proof of dishonesty would not be required to deny the right to input tax. There is no indication in *Ablessio* that a national taxing authority is required to prove dishonesty in order to cancel or refuse VAT registration. If HMRC were required to prove dishonesty then that would represent a significant barrier to the prevention of VAT fraud by deregistering a taxable person facilitating VAT fraud.

103. I do not accept that, in order to apply the principle from *Ablessio* in the absence of an allegation of dishonesty being specifically pleaded, it must additionally be shown that the facilitating party was itself dishonest.

2(b) and (c) The facilitating party knew that it was facilitating the fraud and/or the facilitating party should have known that it was facilitating the fraud.

104. I will deal with the two remaining questions together. Mr Brown accepted that, absent dishonesty, the appropriate test is whether the taxpayer knew or ought to have known that it was facilitating the VAT fraud of the other party. Mr Brown's objections to questions 2(b) and (c) were that: deregistration in those circumstances would be wholly disproportionate and go further than was necessary to prevent evasion and would undermine the neutrality of VAT and the appropriate remedy is the denial of the right to deduct input tax and the imposition of penalties. Those arguments were considered at paragraphs 75-91 above and were rejected. Mr Watkinson submitted that if simple facilitation was not enough to engage the *Ablessio* principle then proof that the taxpayer knew or should have known that its transactions were facilitating VAT fraud must be enough. I agree with both parties that, as stated in *Staatssecretaris van Financien v Schoenimport 'Italmoda' Mariano Previti vof* Case C-131/13; C-163/13; C-164/13 ("*Italmoda*") at [46], the appropriate test, irrespective of the VAT right, is whether the facilitating party knew or should have known that it was facilitating the fraud.

Conclusion

105. In light of all of the above, I find that:

Question 1

106. The principle in *Ablessio* applies both to a party that has fraudulently defaulted on its VAT obligations and to a party who has facilitated the VAT fraud of another party.

Question 2

107. Simple facilitation by a party of the VAT fraud of another is not sufficient to apply the principle in *Ablessio*.

108. It is not necessary to prove that the facilitating party was itself dishonest. It must, however, be proved that the facilitating party knew or should have known that it was facilitating the VAT fraud of another party.

109. I apologise to the parties for the delay in providing this decision which has been caused by a lengthy period of illness.

RIGHT TO APPLY FOR PERMISSION TO APPEAL

110. This document contains full findings of fact and reasons for the preliminary decision. Any party dissatisfied with this preliminary 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.

GERAINT WILLIAMS
TRIBUNAL JUDGE

Release date: 08 FEBRUARY 2022