IN THE HIGH COURT OF JUSTICE **Claim No: No. 4093 of 2013**
CHANCERY DIVISION **Neutral Citation no. [2014 EWHC 548 (Ch)**
COMPANIES COURT

IN THE MATTER OF ENTA TECHNOLOGIES LIMITED

AND IN THE MATTER OF THE INSOLVENCY ACT 1986

BETWEEN:

ENTA TECHNOLOGIES LIMITED

Claimant

-and-

THE COMMISSIONERS FOR HER MAJESTY'S REVENUE AND CUSTOMS

Defendants

Before:
David Donaldson Q.C. sitting as a Deputy High Court Judge

21 March 2014

1. Enta Technologies Limited[1] ("the Company") carries on business as a distributor of personal computers and related products on a substantial scale, with a turnover in the last accounts shown to me of over £110 million, 125 employees, and substantial premises in Stafford Park, Telford. Its founder - the company was formed in 1990 - and managing director is Mr Jason Tsai. Most of its business is as a distributor to UK retail outlets of personal computers and related hardware and software[2]. I was told that it is currently one of the UK's leading IT distributors, dealing with over 60 suppliers, including Microsoft (which has only six distributors in the UK). It also - though I understand it to be a minor part of its activity - buys and resells stock on a back-to-back basis. This includes export sales of high value low bulk products such as computer chips and drives[3], and in such cases, the sale is zero-rated for VAT purposes, leaving the seller with a claim against HMRC for the repayment of the input tax on its upstream purchase. Enta made such claims in its VAT returns for the relevant quarters. Since, however, there was otherwise a substantial net liability to HMRC in respect of other trading, the repayment claim would go in reduction or even substantial elimination of that liability.

2. Some considerable time ago HMRC carried out an investigation (known as Extended Verification) into all Enta's VAT returns since the period 07/06. This led to 36 assessments made on various dates between 4 February 2010 and 5 October 2012 denying repayment claims and requiring further payment by Enta, the total of these decisions amounting to more than £35 million.

3. The first 24 of these assessments, made between 04/02/2010 and 18/07/2012 and covering periods 07/06 to 02/12, are based on HMRC's view that the transactions in question were connected to tax losses resulting from Missing Trader Intra-Community ("MTIC") frauds[4], of which connection Enta knew or ought to have

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[1] The name was changed to Changtel Solutions UK Limited on 14 January 2014, under two weeks prior to the hearing before me, but nothing turns on that change and for convenience I will, as at the hearing, adhere to the former name.

[2] More precisely, Enta sells the stock to Entatech UK Limited, a related company, which deals directly with the trade customers.

[3] Though I use the present tense, it may be that such sales have been suspended in the light of the present dispute.

[4] I understand HMRC to be alleging that the fraud was concealed or obscured by the use of a parallel chain of contra-trades, as explained in *Mobilx Ltd (and others) v HMRC* [2010] STC 1436 at [9] and the cases there cited.

known (as to which see *Kittel v Belgium* [2008] STC 1537, [2006] I-6161 ECJ). The first 17 of these assessments (periods 07/06 to 12/10) were appealed by Enta to the First-tier Tribunal (Tax Chamber) ("the tax tribunal") and are proceeding towards trial in the usual way ("the First MTIC appeal"). It has a time estimate of some 20 days and is expected to be heard later this year.

4. The next 7 assessments (nos. 18-24[5]), made on 18 July 2012 and covering periods 03/11 to 02/12, also reflect the view of HMRC that the transactions were connected to MTIC frauds of which connection Enta knew or ought to have known. It is accepted on both sides that the issues and evidence involved overlap with those in the First MTIC appeal to such an extent that a decision in favour of HMRC on that appeal is likely to be treated by Enta as in practice also determinative of the appeals in relation to these further 7 assessments.

5. The remaining assessments (nos. 25 to 36), made between 16 July 2012 and 11 March 2012, were based on non-MTIC matters, falling into three different categories which I will outline later in this judgment. Two of them, nos. 26 and 27, in the sums of £484,178 and £469, 368 have recently been paid, and no longer require to be addressed, leaving live nos. 25 and 28 to 36.

6. On 7 June 2013 HMRC presented a petition to wind up Enta based on the non-payment of assessments nos. 18 to 36[6]. It is to be recalled that under section 73(9) of the Value Added Tax Act, 1994 the amount of any assessment becomes a debt due from the assessee unless and until is cancelled or reduced on appeal by the tax tribunal.

7. By this time Enta had filed a notice of appeal against these assessments with the tax tribunal. That notice was however substantially out of time and could only be effective if the tribunal granted an extension of time, which Enta sought in its notice.

8. On 21 June 2013 Enta applied for an injunction restraining advertisement or any other further proceeding on the petition and the dismissal of the petition. When the matter came before the court on 22 July 2013 John Jarvis Q.C., sitting as a Deputy Judge, adjourned the matter until after the determination by the tax tribunal of Enta's application for the necessary extension of time. The hearing of that application took place before Judge Poole on 20 August 2013, lasting all or

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[5] The numbering reflects that in a tabular presentation in Mr Hancox's witness statement for HMRC dated 27 June 2013 at paragraph 11.

[6] It replaced an earlier petition on the same grounds presented on 18 April 2013, and indeed advertised, but struck out on 10 June 2013 as an abuse of process for reasons irrelevant for present purposes.

most of a day. He had before him a substantial body of documents and evidence, heard at least some oral evidence, and received significant submissions both in writing and orally. In addition to attacking Mr Tsai's account of how the deadline for appeal had come to be missed, HMRC submitted that the appeal had in any event no real prospects of success. The judge granted the extension. In doing so, he addressed the argument based on the merits of the appeal and stated:

> *"I am not persuaded that the appeals are hopeless and it is only if I were so persuaded that I would refuse an extension of time on that basis."*[7]

HMRC did not seek to appeal this decision to the Upper Tribunal.

9. The judge further ordered that assessments nos. 18 to 24 ("the Second MTIC appeal") should be stayed until the determination of the First MTIC appeal, reflecting the indication from the parties that the fate of the later appeal was likely to turn on that of the first appeal, and made directions in relation to the appeals on the remainder of the assessments ("the non-MTIC assessments"), apart from nos. 26 and 27 where the appeals were withdrawn and the amounts have since been paid.

10. It is well-established that the winding-up jurisdiction is not to be used to resolve genuine and real disputes as to the existence of a debt, and that accordingly a petition should be dismissed as an abuse of process and its advertisement restrained by injunction if the debt relied upon by the petitioner is bona fide disputed on substantial grounds: see e.g. *Re The Arena Corporation Ltd* [2004] BIPR 415 at [53], where Sir Andrew Morritt V-C regarded this as, for all practical purposes, synonymous with a test of "real as opposed to frivolous". In tax cases, the picture is complicated by the fact that the mere existence of the assessment creates a statutory debt, incapable of dispute, which remains extant unless and until any appeal to the tax tribunal is successful and the assessment cancelled (in whole or in part). Understandably, therefore, the focus in these cases has instead been on whether the debt may be cancelled in this manner and hence whether the appeal has a real prospect of success. As in any form of summary procedure, the courts have proceeded with caution, recognising for example that only in an exceptional case could it be right for the court to reject sworn oral evidence on behalf of the company untested by cross-examination: see *Arena*, loc.cit. at [88] and [91] (which many may regard on its facts as at the outer limits of permitted robustness). Had the matter been raised as such, the court in *Arena* might well have added that in ruling on the prospects of success of a tax appeal the winding-

[7] The parties are recorded in the tribunal's order as having waived the need for the decision to include full or summary findings of facts and reasons.

up judge should also bear in mind that this involved the evaluation of matters entrusted by statute to a separate and specialist jurisdiction, reinforcing the need for caution..

11. Importantly, at the date of the *Arena* decision the then VAT tribunal possessed no power to strike out an appeal as possessing no arguable merit. That would have left a lacuna which could result in a winding-up order being delayed - perhaps extensively - by a hopeless appeal, if the winding-up court were not itself prepared to examine the merits. The approach of the courts at that time is therefore well understandable. However, since April 2009, when VAT appeals moved to the First-tier Tribunal, new rules have provided (in rule 8(3)(c) that the tribunal may strike out an appeal or part of it if

> *"the Tribunal considers there is no reasonable prospect of the appellant's case, or part of it, succeeding"*[8].

Now that it has been invested with this power, the appropriate forum to determine whether the appeal has real prospects of success must be the tribunal itself. This is not only because adjudication on the correctness of the tax assessment has been entrusted to that specialist tribunal (cf *Autologic Holdings plc v IRC* [2006] 1 A.C. 118) but also because the evaluation of the appeal's merits involves a prognosis as to the possible outcome of that adjudication. In such circumstances, the winding-up court should in my view now, post-2009, refuse itself to adjudicate on the prospective merits of the appeal and leave that question to be dealt with by the tribunal, either dismissing the petition[9] or staying it in the meantime. It was suggested before me that this might lead to serious delay to the petition, but I can see, and was provided with no material to suggest the contrary, no reason why such an application to the tribunal should take significantly longer to determine than the same issue arising in the context of a contested winding-up petition[10].

12. The need for this abdication or deference by the winding-up court is compounded in the present case, where the tribunal has already ruled that the appeals are not *"hopeless"*, in other words not devoid of reasonable or real prospects of success. Nor was that a mere *obiter* statement: the judge made clear

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[8] Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009/273

[9] On this approach it would appear wrong to even present, let alone advertise, a petition before applying to the tribunal to strike out an existing appeal under rule 8(3)(c).

[10] Following the traditional reluctance of judges to use the word "never" in relation to the exercise of a discretion, it would be rash to exclude in principle the power of the winding-up court to proceed differently in a truly exceptional case, but I am currently unable to conceive of one which could justify that course.

that absent such prospects he would not have granted the extensions of time. This may not amount formally to an issue estoppel. In particular, it would lack the necessary element of finality if, as may be the case, it would be open to the tax tribunal to reach a different conclusion on a later application by HMRC to strike out the appeal under rule 8(3)(c), though whether the tribunal could properly entertain such an application in the absence of either materially altered circumstances or, possibly, a sea-change in the available evidence, neither of which I currently discern here, must be open to serious doubt. But any attempt to revisit the tax judge's ruling should be done by an application to the tribunal itself rather than by invitation to a winding-up court to second-guess that decision.

13. In the case of the assessments included in the Second MTIC appeal that is reinforced by the fact that they are accepted to be in terms of evidence and issues in large part co-extensive with those in the First MTIC appeal, which is being actively progressed to trial without any application ever having been made to strike it out for lack of merit under rule 8(3)(c).

14. These matters are in themselves sufficient to lead me to the conclusion that the petition should be dismissed as an abuse of process and/or as a matter of discretion and the advertisement restrained.

15. As regards the prospective merits of the appeals, I raised with the parties at the outset of the hearing before me whether it was at all sensible for the court to spend a considerable amount of time - likely to be far beyond the estimate allowed for the hearing - in examining the evidence underlying the assessments and appeals, before it had determined whether that was a legitimate or appropriate exercise in the light of the matters which I have discussed above. In effect, I suggested that it might be preferable to deal with the latter point as a preliminary issue. Counsel for HMRC strongly opposed this course. She did however volunteer the concession that if she were unable to persuade the court that any of the non-MTIC appeals were without a real prospect of success the same would apply to the Second MTIC Appeal. On this basis, she accepted that it would not be necessary to consider the MTIC assessments as such, while contending that at least parts of the evidence relating to them could be cross-read to the non-MTIC assessment[11]. Though this approach shortened the hearing considerably, it still took a full three days (in addition to some hours of judicial pre-reading), confirming my original instinctive reaction that it should have been confined to the preliminary point.

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[11] In the event, counsel referred me to very little by way of cross-reading, but encouraged me to read more widely on my own. I did so, but found scant assistance.

16. In the circumstances, I shall only outline briefly the nature of the disputes on the non-MTIC assessments. They fall into three categories.

17. Firstly, assessment no. 29 for period 03/12 in the sum of £1,099,140. This relates to input VAT on invoices from I-Force Limited disallowed by HMRC on the basis that the reclaims duplicated claims already made in periods 01/12 and 02/12. Enta says that HMRC has been misled by a monthly disc not forming part of its accounting records and that examination of its purchase day-book ledger demonstrates that there has been no such duplication.

18. Secondly, assessment no. 36 for 2011-2012 in the sum of £1,154,652. HMRC says that there is a mismatch between the figures for turnover in Enta's VAT returns and those in its annual accounts. Enta says that this was due to an inadvertent failure to add its export sales (which were shown in a separate box) into the box for total sales, and moreover that return figures compiled by HMRC were not for the same period as the annual accounts. HMRC retorts that even taking these corrections on board, the figures presented by Enta have varied and are unreliable.

19. Thirdly, assessments nos. 30-35 totalling £2,537,172. These relate to export sales in respect of which Enta has in its return reclaimed the input tax on its corresponding purchases. For this purpose an exporter must obtain and keep valid commercial documentary evidence that the goods have been removed.

    a. In these cases the goods were, according to Enta, purchased from UK suppliers and resold to EU purchasers, who arranged the carriage from warehouses in in Cardiff, Huddersfield, and Burton-on-Trent (where the suppliers or their agents held the goods) to warehouses designated by the purchaser in Belgium and Spain, the carriage being effected by either a French or a German company. The documentation evidencing removal thus had to be provided to Enta by its purchasers or their forwarding agents or carriers, and consisted inter alia of CMR consignment notes and ticket reservations on Eurotunnel. HMRC has produced a large quantity of evidence inconsistent with the accuracy of that documentation, including information from persons visiting the warehouses, some of which are reported not to exist or be operating, and from the police computer showing that the numbers of the carrying vehicles do not tally (one was for example a tipper truck and another a saloon car). Against this, Enta has produced evidence of its own relating to the warehouses and from its purchasers stating that they or their customers received the goods, and that everyone has received payment. Enta is entitled to stress that in so far as this material is non-documentary it is untested, on either side, by cross-examination, but in its totality the HMRC evidence on this point might well be regarded by the tribunal as *prima facie* formidable.

b. It is not however the only point. In *Teleos* Case C-409/04 (27.9.2007), on a reference from the High Court, the European Court of Justice ruled that a tax authority could not require a supplier who acted in good faith and submitted evidence establishing at first sight a right to be exempted from output tax on an intra-Community sale of goods to account for such tax where that evidence was found to be false without the supplier's involvement in the tax evasion being established, provided that the supplier took every reasonable measure in his power to ensure that the supply he was effecting did not lead to his participation in such evasion. Thus even if the tribunal were to find that the documentation was false, it would still need to consider whether Enta failed to take some reasonable measure to avoid involvement in tax evasion. Where, as apparently in the present cases, the sales were ex-UK warehouse, it is open to debate what more could properly have been expected of a seller in the position of Enta beyond obtaining a copy of an apparently genuine CMR carriage note[12].

20. Given the basis of my ruling in paragraph 14 above, it is not appropriate for me in this judgment to engage in any analysis of the competing evidence or submissions relating to any of the non-MTIC assessments. The tribunal should be left to determine the appeals without such distraction from the winding-up court. Without any breach of judicial comity I can however record without elaboration that in common with the tribunal judge I did not form the view that any of the non-MTIC appeals had no real prospect of success. As it was conceded that this conclusion must also be applied to the MTIC appeals, I would therefore, had it been appropriate, have dismissed the petition (and/or restrained its advertisement) for this alternative reason.

[12] I was not referred by either party to tribunal cases applying *Teleos* (a number of which are available online), perhaps because they are of necessity fact-specific. If anything, that underscores the desirability of such questions being determined by the specialist tribunal to which they are entrusted. It cannot be the proper role of the winding-up court to deduce from such cases some rule or regularity of practice which has not been identified by the tribunal itself.