TC03437

Appeal number: TC/2012/03604

VAT – Strike out application – Penalty imposed following withdrawal of appeal by appellant – Effect of s 85 Value Added Tax Act 1994 on withdrawal of appeal – Whether appellant estopped from appealing against penalty on the same grounds as it raised in withdrawn appeal and/or whether an abuse of process to do so

FIRST-TIER TRIBUNAL
TAX CHAMBER

MERIDIAN DEFENCE & SECURITY LIMITED **Appellant**

- and -

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

TRIBUNAL: JUDGE JOHN BROOKS
MRS SUSAN LOUSADA

Sitting in public at 45 Bedford Square, London WC1 on 3 March 2014

The Appellant was not represented

Maria Roche, counsel, instructed by the General Counsel and Solicitor to HM Revenue and Customs, for the Respondents

DECISION

1. This is an application by HM Revenue and Customs ("HMRC") to strike out the appeal of Meridian Defence and Security Limited ("Meridian") against misdeclaration penalties of £102,955 and £85,519, imposed under s 63(1)(a) of the Value Added Tax Act 1994 ("VATA"), in respect of overstated claims for input tax in its 04/06 and 05/06 VAT accounting periods respectively.

Absence of Representation for Appellant

2. Although Maria Roche of counsel appeared for HMRC Meridian was not represented. However, shortly before the hearing was due to commence the tribunal office received a telephone call from Meridian's director, Parvaz Ali, to explain that he was unable to attend as he was suffering from a bad back. Although it was a long term problem he said that it had been exacerbated that morning when he getting ready to travel to the hearing. He presented no medical evidence and was unable to provide any in relation to his condition, although he said that he could do at later date, and asked for the hearing to be postponed to enable him to attend when it was re-listed.

3. However, this was not the first time that an adjournment had been sought by Meridian. The application had originally been listed for a hearing before us on Monday 5 August 2013 and was adjourned following a renewed oral application (as a written postponement application made on 26 July 2013 had been refused by the Tribunal) by Mr Ali and Mark Hussey, Meridian's company secretary. The basis of that adjournment application was that, although it had received notice of the hearing, due to a "strained relationship" with its accountant who had until recently been acting for the company and had not forwarded relevant documents, they were not in possession of sufficient information to enable a fair hearing to take place having only received a copy of HMRC's Statement of Case on Thursday 1 August 2013, following a request to the Tribunal the previous day.

4. Ms Roche, who also appeared for HMRC on 5 August 2013, opposed the adjournment emphasising, quite correctly, that Meridian, which had been professionally represented until shortly before the 5 August 2013 hearing, had been aware of HMRC's arguments as its professional adviser had received the Statement of Case in September 2012.

5. Having regard to the overriding objective contained in rule 2 of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009 (the "Rules") to "deal with cases fairly and justly", we reluctantly concluded, on balance, to allow the adjournment application which would give Meridian an opportunity to obtain legal advice and/or prepare for hearing which was re-listed for 3 March 2014. Notice of the date of the re-listed hearing was sent to the parties on 18 November 2013. This warned the parties that if they did not attend "the Tribunal may decide the matter in your absence."

6. Under rule 33 of the Rules the Tribunal may proceed with a hearing if satisfied that a party has been notified of the hearing and considers it in the interests of justice to do so. It is clear, from his telephone call to the Tribunal, that Meridian's director Mr Parvaz had received notice of the hearing and was aware of the hearing date.

7. In considering whether it was in the interests of justice to proceed with the present hearing in the absence of any representation on behalf of Meridian we had regard, as we must, to the overriding objective of the Rules to deal with the case fairly and justly. This includes the avoidance of delay, so far as compatible with proper consideration of the issues (see rule 2(2)(e) of the Rules). Given the lapse of time, the merits of the case, the need to do justice to both parties and the possibility of an application by Meridian under rule 38 of the Rules for this decision to be set aside on the basis that it was not represented at this hearing if it were in the interests of justice to do so, we considered that it was in the interests of justice to proceed with the hearing in the absence of any representation on behalf of Meridian.

Background

8. Meridian was notified by HMRC, in a letter dated 22 October 2009, that its claims for deduction of input tax in the sums of £915,160.59 in its 04/06 VAT period and £760,173.46 in its 05/06 VAT period had been denied on the grounds that the relevant transactions were part of an overall scheme to defraud the Revenue and that Meridian knew or should have known of the connection to fraud.

9. On 30 October 2009 Meridian appealed against the decision to deny its recovery of input tax. However, on 18 April 2011, Bark & Co, its solicitors wrote to the Tribunal withdrawing its appeal.

10. The penalties, the subject of the present proceedings, were issued by HMRC on 22 October 2011 and were calculated at 15% of the input tax claimed by Meridian but were reduced by 15% because of mitigating factors. Following a review, requested by Meridian on 1 November 2011, there was a further 10% reduction in the penalties.

11. On 23 February 2012 Meridian appealed to the Tribunal on the grounds that:

> The original imposition of the 2 misdeclaration penalties was based on the refusal of HMRC to repay VAT claimed for the periods 04/06 and 05/06 in the sums of £915,160.59 and £760,173.46 respectively. HMRC contended that Meridian had been aware of an overall scheme to defraud the Revenue or should have known this was the case. Such accusation or inference was never proven. Furthermore Meridian employed VAT consultants and a barrister to pursue its claim to repayment but ultimately could not afford the extensive costs of going to court.
>
> As Meridian could not continue its fight for repayment its claim fell into default. HMRC later issued a misdeclaration penalty for each of the periods mentioned above on 5 October 2011. A formal appeal to review was lodged on 1 November 2011. HMRC rejected Meridians case in their letter of 27 January 2012 although the penalties were

> reduced to £102,955 for 04/06 and £85,519 for 05/06. Copies of all documents are attached.
>
> Meridians appeal against the misdeclaration penalty is on the basis that it is incorrect in law and in direct contravention of the findings in the case of HMRC v LIVEWIRE where the court laid down guidance that HMRC are obliged to accept.
>
> Mr Justice Lewison soundly dismissed the case put forward by HMRC on the basis that 'their case must fail'. The court made it clear that a trader who has taken all reasonable steps to avoid being caught up in fraud has, to quote Justice Lewison 'an impenetrable shield against any claim by HMRC that he had the means of knowledge of fraud. Furthermore flaws in due diligence are not necessarily fatal unless HMRC can demonstrate a causative link to the failure.
>
> The only tangible difference between Meridians case and Livewire is that Livewire had the financial resources to take their claim to the high court whereas Meridian, unfortunately did not
>
> We consider that as no causative link to fraud or knowledge thereof has been proven by HMRC they cannot pursue the misdeclaration penalty for the reasons outline above.

Under the "Result" section of the Notice of Appeal it is stated:

> Meridian consider that as their original claim to repayment was denied purely because they did not have the funds to pursue their case it is grossly unfair to levy a misdeclaration penalty.
>
> Our clients received no money. HMRC did not lose any money. Meridian considers it is being fined for pursuing a legitimate claim which was denied without any evidence of fraud of knowledge thereof.

12. On 7 March 2012, Bark & Co wrote to HMRC stating:

> Our client's [Meridian] position remains clear: the VAT returns filed in respect of the 04/06 and 05/06 are correct and a reclaim is due to it
>
> Our client withdrew its Appeals from the Tribunal on commercial grounds alone. You appear to have misunderstood the situation and assumed that our client's withdrawal was a concession that the VAT returns filed were incorrect.

Legislation

13. Insofar as it applies to the present case s 63 VATA provides:

> (1) In any case where, for a prescribed accounting period –
>
> (a) a return is made which understates a person's liability to VAT or overstates his entitlement to a VAT credit, or
>
> (b) an assessment is made which understates a person's liability to VAT and, at the end of the period of 30 days beginning on the date of the assessment, he has not taken all such steps as are

reasonable to draw the understatement to the attention of the Commissioners,

and the circumstances are as set out in subsection (2) below, the person concerned shall be liable, subject to subsections (10) and (11) below, to a penalty equal to 15 per cent, of the VAT which would have been lost if the inaccuracy had not been discovered.

(2) The circumstances referred to in subsection (1) above are that the VAT for the period concerned which would have been lost if the inaccuracy had not been discovered equals or exceeds whichever is the lesser of £1,000,000 and 30 per cent of the relevant amount for that period.

(3) Any reference in this section to the VAT for a prescribed accounting period which would have been lost if an inaccuracy had not been discovered is a reference to the amount of the understatement of liability or, as the case may be, overstatement of entitlement referred to in relation to that period, in subsection (1) above.

(4) In this section "the relevant amount", in relation to a prescribed accounting period, means –

(a) for the purposes of a case falling within subsection (1)(a) above, the gross amount of VAT for that period; and

(b) for the purposes of a case falling within subsection (1)(b) above, the true amount of VAT for that period.

(5) In this section "gross amount of tax", in relation to a prescribed accounting period, means the aggregate of the following amounts, that is to say –

(a) the amount of credit for input tax which (subject to subsection (8) below) should have been stated on the return for that period, and

(b) the amount of output tax which (subject to that subsection) should have been so stated.

…

(7) In this section "the true amount of VAT", in relation to a prescribed accounting period, means the amount of VAT which was due from the person concerned for that period or, as the case may be, the amount of the VAT credit (if any) to which he was entitled for that period.

…

(10) Conduct falling within subsection (1) above shall not give rise to liability to a penalty under this section if –

(a) the person concerned satisfies the Commissioners or, on appeal, a tribunal that there is a reasonable excuse for the conduct, or

(b) at a time when he had no reason to believe that enquiries were being made by the Commissioners into his affairs, so far as they relate to VAT, the person concerned furnished to the

Commissioners full information with respect to the inaccuracy concerned.

14. Under s 70 VATA HMRC (or on appeal) the Tribunal may "reduce the penalties to such amount (including nil) as they think proper."

15. Section 85 VATA provides:

> (1) Subject to the provisions of this section, where a person gives notice of appeal under section 83 and, before the appeal is determined by a tribunal, the Commissioners and the appellant come to an agreement (whether in writing or (otherwise) under the terms of which the decision under appeal is to be treated-
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> (a) as upheld without variation, or
>
> (b) as varied in a particular manner or
>
> (c) as discharged or cancelled
>
> the like consequences shall ensure for all purposes as would have ensued it, at the time when the agreement was come to a tribunal had determined the appeal in accordance with the terms of the agreement (including any terms as to costs).
>
> (2) Subsection (1) above shall not apply where, within 30 days from the date when the agreement was come to, the Applicant gives notice in writing to the Commissioners that he desires to repudiate or resile for the agreement.
>
> (3) Where an agreement is not in writing –
>
> (a) the preceding provisions of this section shall not apply unless the fact that an agreement was come to, and the terms agreed, are confirmed by notice in writing given by the Commissioners to the Applicant or by the Applicant to the Commissioners, and
>
> (b) references on those provisions to the time when the agreement was come to shall be construed as references to the time of the giving of that notice of confirmation.
>
> (4) Where –
>
> (a) a person who has given a notice of appeal notifies the Commissioners, whether orally or in writing, that he desires not to proceed with the appeal; and
>
> (b) 30 days have elapsed since the giving of the notification without the Commissioners giving to the Applicant notice in writing indicating that they are unwilling that the appeal should be treated as withdrawn.
>
> the proceeding provisions of this sections hall have effect as if, at the date of the Applicant's notification, the Applicant and the Commissioners had come to an agreement, orally or in writing, as the case may be, that the decision under appeal should be upheld without variation.

> (5) References in this section to an agreement being come to with an Applicant and the giving of notice or notification to us by an Applicant include references to an agreement being come to with, and the giving of notice or notification to or by, a person acting on behalf of the Applicant in relation to the appeal."

16. The Tribunal may strike out the whole or part of proceedings under rule 8(3)(c) of the Rules if it considers that there is no reasonable prospect of the appellant's case succeeding but may only do so if the appellant is given an opportunity to make representations in relation to the proposed striking out in accordance with rule 8(4) of the Rules.

Discussion and Conclusion

17. As Meridian's present appeal is on the same grounds as its appeals against the denial of input tax which, it is contended on behalf of Meridian, was withdrawn on commercial grounds, it is therefore necessary to consider whether it is entitled to raise the same arguments in relation to the penalties that it intended to run at the withdrawn appeal, namely that the figures stated on its 04/06 and 05/06 returns were correct and did not understate Meridian's liability to VAT or overstate its entitlement to a VAT credit.

18. For HMRC, Ms Roche submits that misdeclaration penalties were imposed on Meridian in accordance with the legislation. Therefore, it is estopped from relying on the same grounds of appeal that it raised in its appeal against the denial of input tax and/or that to do so is an abuse of process and, as such, this appeal cannot succeed and should be struck out.

19. In *Thoday v Thoday* [1964] P 181 at 198 Diplock LJ (as he then was) said in relation to "issue estoppel":

> "If in litigation upon one such cause of action any of such separate issues as to whether a particular condition has been fulfilled is determined by a court of competent jurisdiction, either on evidence or on admission by a party to the litigation, neither party can, in subsequent litigation between one another upon any cause of action which depends upon the fulfilment of the identical condition, assert that the condition was fulfilled if the court has in the first litigation determined that it was not, or deny that it was fulfilled if the court in the first litigation determined that it was."

20. The Special Commissioner (Charles Hellier) after citing the above passage from *Thoday* in *Carter Lauren Construction v HMRC* [2007] STC (SCD) 482 went on to consider the application of issue estoppel in tax cases. The case concerned the previous Construction Industry Scheme in which the question of whether a default was "minor and technical" arose. At [54] the Special Commissioner said:

> "It cannot be in the public interest or in the interests of the finality of litigation that the exact same issue should be capable of being litigated afresh - with potentially different answers - in more than one appeal. If HMRC refuse a certificate on the grounds that default A is not minor

> and technical and the tribunal decides that it was minor and technical, it cannot be right that the next day HMRC should be able to revoke the certificate on the same ground, and in the subsequent litigation argue that that very default was not minor and technical. Neither can it be right that the taxpayer should be allowed almost countless bites at the same cherry."

21. As Lord Goff of Chieveley said at 506 of the decision of the House of Lords in *Johnson v Gore Wood & Co* [2001] 1 All ER 481 Lord Bingham reviewed the relevant authorities on abuse of process in "lucid detail". Concluding his review of the authorities Lord Bingham said (at 498-499):

> "It may very well be, as has been convincingly argued (Watt, "The Danger and Deceit of the Rule in *Henderson v. Henderson*: A new approach to successive civil actions arising from the same factual matter," 19 *Civil Justice Quarterly*, (July 2000), page 287), that what is now taken to be the rule in *Henderson v. Henderson*, has diverged from the ruling which Wigram V.-C. made, which was addressed to res judicata. But *Henderson v. Henderson* abuse of process, as now understood, although separate and distinct from cause of action estoppel and issue estoppel, has much in common with them. The underlying public interest is the same: that there should be finality in litigation and that a party should not be twice vexed in the same matter. This public interest is reinforced by the current emphasis on efficiency and economy in the conduct of litigation, in the interests of the parties and the public as a whole. The bringing of a claim or the raising of a defence in later proceedings may, without more, amount to abuse if the court is satisfied (the onus being on the party alleging abuse) that the claim or defence should have been raised in the earlier proceedings if it was to be raised at all. I would not accept that it is necessary, before abuse may be found, to identify any additional element such as a collateral attack on a previous decision or some dishonesty, but where those elements are present the later proceedings will be much more obviously abusive, and there will rarely be a finding of abuse unless the later proceeding involves what the court regards as unjust harassment of a party. It is, however, wrong to hold that because a matter could have been raised in early proceedings it should have been, so as to render the raising of it in later proceedings necessarily abusive. That is to adopt too dogmatic an approach to what should in my opinion be a broad, merits-based judgment which takes account of the public and private interests involved and also takes account of all the facts of the case, focusing attention on the crucial question whether, in all the circumstances, a party is misusing or abusing the process of the court by seeking to raise before it the issue which could have been raised before. As one cannot comprehensively list all possible forms of abuse, so one cannot formulate any hard and fast rule to determine whether, on given facts, abuse is to be found or not. Thus while I would accept that lack of funds would not ordinarily excuse a failure to raise in earlier proceedings an issue which could and should have been raised then, I would not regard it as necessarily irrelevant, particularly if it appears that the lack of funds has been caused by the party against whom it is sought to claim. While the result may often be the same, it

> is in my view preferable to ask whether in all the circumstances a party's conduct is an abuse than to ask whether the conduct is an abuse and then, if it is, to ask whether the abuse is excused or justified by special circumstances. Properly applied, and whatever the legitimacy of its descent, the rule has in my view a valuable part to play in protecting the interests of justice."

22. It is clear from these decisions that there should be finality in litigation and that neither party, once an issue has been determined between them, should be able to challenge the outcome of that issue in subsequent proceedings or re-litigate that issue leading potentially to a different outcome. This raises the issue, in the present case, of whether the grounds of appeal relied upon by Meridian have been determined as a result of the application of s 85 VATA.

23. In our judgment the effect of the legislation in this case is that once Meridian had withdrawn its original appeal that appeal was deemed, by virtue of s 85(4) VATA, to have been settled by agreement. Accordingly, in accordance with s 85(1) the decision of HMRC that was under appeal is to be treated "as upheld without variation" for "all purposes" as if the Tribunal had determined the appeal.

24. Therefore, on 18 April 2011, as a result of withdrawing its appeal there was in effect a binding Tribunal determination that Meridian's claims for input tax for 04/06 and 05/06 was incorrect as it was overstated and had no right to deduct input tax attributable to the transactions for which its recovery had been denied on the basis that it knew or should have known that these transaction were connected to fraud. This therefore disposes of the issue of whether the 04/06 and 05/06 returns are correct and, as such, Meridian is estopped from advancing the same arguments in the present appeal. In addition we find that it would be an abuse of process were it to be allowed to do so.

25. Section 63(1) VATA provides that where a return is made which understates a person's liability to VAT or overstates his entitlement to a VAT credit, the person concerned shall be liable to a penalty equal to 15 per cent of the VAT which would have been lost if the inaccuracy had not been discovered provided it exceeds the threshold in s 63(2) VATA and there is no reasonable excuse or furnishing of information with regard to the inaccuracy when there was no reason to believe enquires were being made under s 63(10)(a) and (b) VATA respectively.

26. As no evidence was adduced by Meridian that it had a reasonable excuse or had furnished of information in regard to the inaccuracy, we find that the misdeclaration penalties were correctly imposed in accordance with the legislation. Given that that it is either estopped from advancing the arguments and grounds of appeal raised in its withdrawn appeal or alternatively that it would be an abuse of process if it was permitted to do so as the issues raised have been determined in accordance with s 85 VATA, we find that there is no reasonable prospect of Meridian's appeal against the misdeclaration penalties succeeding.

27. Turning to the question of "fairness" which was raised by Meridian in its Notice of Appeal it must be remembered that this Tribunal, the Tax Chamber of the

First-tier Tribunal, was created by statute and unlike the High Court it does not have an inherent jurisdiction, rather its jurisdiction is defined and limited by legislation. This is clear from decisions of the higher courts and Tribunals whose decisions are binding on the Tribunal, eg in the decision of the Tax and Chancery Chamber of the Upper Tribunal in *HMRC v Hok Ltd* [2012] UKUT 363 (TC) in which the judges (Warren J and Judge Bishopp) said, at [56]:

> "… the First-tier Tribunal has only that jurisdiction which has been conferred on it by statute, and can go no further, …It is impossible to read the legislation in a way which extends its jurisdiction to include—whatever one chooses to call it—a power to override a statute or supervise HMRC's conduct."

As Judge Blewitt recently noted at [9] of *Lambton Clothing Company Ltd v HMRC* [2014] UKFTT 251 (TC) *Hok* "made [it] clear that this Tribunal has no jurisdiction to consider the issue of fairness where the penalty was charged in accordance with the legislation."

28. We appreciate that rule 8(4) of the Rules provides that the Tribunal may not strike out proceedings under rule 8(2)(c) of the Rules without giving an appellant an opportunity to make representations in relation to HMRC's application to strike out its appeal against the misdeclaration penalties. However, such an opportunity has been given by this hearing and therefore, as we have found that there is no reasonable prospect of Meridian's appeal against the misdeclaration penalties succeeding, we strike out its appeal.

Wasted Costs

29. Under rule 10 of the Rules the Tribunal may make an order requiring one party to pay the "wasted costs" of another. However, such an order may only be made after giving the paying party an opportunity to make representations.

30. On 5 August 2013 Ms Roche raised the issue of HMRC's costs of the preparation for, and attendance at, that hearing which would be wasted should it be adjourned. Although we allowed the adjournment we were concerned that HMRC had incurred costs (eg attending the hearing and instructing counsel) which would be wasted as a result. We therefore directed that a schedule of these wasted costs be prepared and served on the Tribunal and the Company and directed that at the commencement of this re-listed hearing Meridian should be given an opportunity to make representations as to why the Tribunal should not make a wasted costs order.

31. HMRC complied with the direction on 3 September 2013 serving a schedule showing their costs of £2,232 in relation to the 5 August 2013 hearing. Having been given an opportunity to make submissions, which could have been made in writing and sent to the Tribunal despite the absence of any representation on behalf of Meridian at this hearing no submissions were made on behalf of Meridian we summarily assess HMRC's costs of the 5 August 2013 hearing in the sum of £2,232 and direct that these are paid by Meridian within 28 days of the release of this decision.

Right to apply for Permission to Appeal

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

JOHN BROOKS
TRIBUNAL JUDGE

RELEASE DATE: 25 March 2014