TC08012

PROCEDURE – application to strike out appeal – no reasonable prospect of success – Rule 8(3)(c) – MTIC appeal – evidence filed by Appellant alleged not to deal with case advanced by HMRC

FIRST-TIER TRIBUNAL
TAX CHAMBER

Appeal number: TC/2017/01856
TC/2017/01858

BETWEEN

TASCA TANKERS LIMITED **Appellant**

-and-

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

TRIBUNAL: JUDGE GUY BRANNAN

The hearing took place on 7 December 2020. With the consent of the parties, the form of the hearing was a remote video hearing on the Tribunal Video Platform. A face-to-face hearing was not held because of the COVID-19 pandemic. Prior notice of the hearing had been published on the gov.uk website, with information about how representatives of the media or members of the public could apply to join the hearing remotely in order to observe the proceedings. The hearing was, therefore, held in public.

Tim Brown, counsel, instructed by Independent VAT Consultants Limited for the Appellant

Joshua Carey, counsel, instructed by the General Counsel and Solicitor to HM Revenue and Customs for the Respondents

DECISION

INTRODUCTION

1. The Respondents ("HMRC") have given the Appellant notice of two decisions.

2. The first decision, dated 29 June 2016, was that the Appellant failed to hold sufficient evidence of dispatch to the Republic of Ireland to entitle it to a zero-rate on its supplies, rather than charging output tax at standard rate, for VAT periods 03/15-03/16. This was extended by a further decision dated 23 August 2016 to include sales made in the VAT period 06/16.

3. The second decision was dated 13 October 2016 and related to the Appellant's input tax for VAT periods 12/14-06/16. The input tax was denied on the basis that the Appellant knew or should have known that its transactions were connected with the fraudulent evasion of VAT in accordance with the *Kittel* principle[1]. In other words, the second decision involved what is commonly known as an "MTIC" denial of input tax. The total amount input tax involved in the second decision is £214,386.38.

4. The Appellant filed a notice of appeal against the first decision on 22 February 2017. The ground of appeal was that it was the Appellant's contention that it did hold sufficient evidence to prove that the goods in question had been removed from the UK.

5. On the same day, the Appellant filed a notice of appeal against the second decision. The ground of appeal was that it was the Appellant's contention that they did not know or should not have known that their transactions were linked to a fraudulent scheme to evade VAT.

6. Pursuant to the Directions issued by this Tribunal (subsequently varied by consent of the parties) the Respondents filed all their evidence on the 10 August 2018. Four witnesses for HMRC have filed a total of five witness statements (Officers Wood, Arnold, Robertson and O'Neill), comprising approximately 58 pages of evidence. The exhibits to those witness statements run to approximately 890 pages. The Appellant has filed three witness statements comprising approximately 17 pages of evidence and one witness attached some bank statements.

7. HMRC have applied to strike out the Appellant's appeal against the second decision (i.e. on the *Kittel* principle) on the basis that its failure to meet the evidence adduced by HMRC means that there is no reasonable prospect of the Appellant's appeal succeeding. As I understood it, no strike out application was being made in respect of the first decision i.e. the lack of evidence of dispatch.

8. HMRC observe that there has been no challenge to much of their case. There has been no challenge, it is argued, to the tax loss, fraud or connection. There has been extremely limited challenge, in HMRC's view, to the objective factors that HMRC identified as demonstrating knowledge or means of knowledge. HMRC argue that the Appellant's director did not deny knowledge or the means of knowledge of connection with fraud in his statement, neither did Ms Woods. No documentation, other than banking information, has been exhibited.

9. It is common ground that in MTIC cases, such as the present, the burden of proof lies on HMRC to prove that the Appellant knew or should have known that the transactions (in respect of which it claims credit for input tax) were connected with the fraudulent evasion of VAT.

[1] *Axel Kittel v Belgium & Belgium v Recolta Recycling SPRL* C-439/04 and C-440/04 [2008] STC 1537

BACKGROUND

Procedural background

10. On 3 May 2018 this Tribunal issued Directions ("the Directions") in respect of these appeals. So far as material, the Directions provided:

> "3. That by no later than 5.00 p.m. on 26 June 2018 the Respondents [HMRC] shall file with the Tribunal all witness statements on which they intend to rely, without exhibits, and serve that same evidence, with exhibits, on the Appellant.
>
> 4. That by no later than 5.00 p.m. two (2) months from the date of compliance with direction three (3) being the 26 August 2018, the Appellant shall file with the Tribunal all witness statements on which it intends to rely, without exhibits, and serve that same evidence, with exhibits, on the Respondents.
>
> 5. That by no later than 5.00 p.m. one (1) month from the date of compliance with direction four (4), the Respondents shall file and serve any further evidence upon which they intend to rely.
>
> 6. That to the extent that the Respondents do not seek to adduce any further evidence in compliance with direction five (5), they shall advise the Appellants by no later than the time for compliance with direction five (5).
>
> 7. That the witness statements shall stand as evidence in chief of the witness subject to such further questions as the Tribunal may allow.
>
> 8. That by no later than 5.00 p.m. one (1) month from the date of compliance with direction six (6), the Appellant shall specify by way of written document its position on the following issues:
>
> a. Whether the Appellant accepts that the transaction chains, as set out in the deal sheets produced by the Respondents in relation to the Appellant's purchases on which the Respondents have denied input tax recovery, accurately reflect the trading history of the goods bought and sold by the Appellant. If the Appellant does not accept the accuracy of the deal sheets, the Appellant should specify which chains it considers incorrect and why;
>
> b. Whether, in respect of chains alleged to be directly connected with a defaulter, the Appellant accepts that there has been a fraudulent VAT default at the start of the chain and, if not, why;
>
> c. In relation to any other witness statements served by the Respondents what, if any, of the matters of fact in dispute.
>
> …"

11. On 25 June 2018, HMRC applied for an extension to the Directions in order to file their evidence. In compliance with the amended Direction 3, HMRC served their evidence on 10 August 2018.

12. In compliance with Direction 4 (as amended), the Appellant served its evidence on 28 February 2019.

13. The Tribunal wrote to HMRC on 13 May 2019 noting that it had not received confirmation that they have served further evidence in compliance with Direction 5. The letter gave HMRC seven days in which to respond. Mr Carey, appearing for HMRC, seemed uncertain whether HMRC had responded. There is, however, no evidence to indicate that HMRC did respond and I conclude that, indeed, HMRC did not respond to the letter of 13 May 2019. Thus, HMRC have failed to comply with Direction 5 and 6.

14. HMRC applied on 17 July 2019 to have the Appellant's case struck out on the basis that its appeal had no reasonable prospect of success.

THE EVIDENCE

15. I shall summarise the evidence before me. I make no findings of fact in relation to this evidence but summarise it because it forms the background to and the basis for HMRC's application.

Summary of HMRC's evidence

16. As I have said, the appeal against the second decision is what is called an MTIC appeal i.e. an appeal against a denial of input tax under the *Kittel* principle. Unlike MTIC cases which commonly involved small high value goods, such as mobile phones or computer chips, the present appeal concerns the purchase by the Appellant in Northern Ireland of high value second-hand cars which are then, so it is alleged, exported (dispatched) to the Republic of Ireland. The Appellant claimed a refund of the input tax on its purchases.

17. The total number of transactions for each VAT period is as follows: 12/14 – 7 transactions; 03/15 – 1 transaction; 06/15 – 2 transactions; 09/15 – 4 transactions; 12/15 – 5 transactions; 03/16 – 3 transactions; 06/16 – 2 transactions. Thus, there are 24 transactions under appeal.

18. The Appellant was incorporated in September 1994 and was registered for VAT in February 1995. Its main business was the manufacture, sale (new and second-hand) and repair of road tankers.

19. The Appellant had three directors: Mr Alwyn Bowering; Mr Thomas Patrick McDonnell; and Mr Andrew Stokes. Mr Shaun Harte ("Mr Harte") is described as the CEO of the Appellant and owns 25% of the shares. Mr Harte was not, apparently, an employee but provides management services to the company and is listed as a creditor. Mr Harte was solely in charge of the financial side of the business and the directors were solely involved in the manufacturing and repair side of the business. None of the directors filed witness statements in support of this appeal.

20. The Appellant did not inform HMRC that it had commenced trading in second-hand cars to the Respondents. However, HMRC received mutual assistance requests from the Republic of Ireland's tax authorities, and this prompted HMRC to visit to the Appellant on 20 April 2016.

21. At that visit, HMRC spoke with Ms Vicki Wood, who provided information about the Appellant. Ms Wood was the Appellant's book-keeper. On 14 June 2016 HMRC discussed MTIC activities, due diligence and third party payments with the directors and Mr Harte. HMRC also provided the Appellant with Public Notice 726 and accompanying MTIC fact sheets. The Appellant was also advised that 22 of the relevant transactions, at that time, traced to the fraudulent evasion of VAT.

22. In HMRC's evidence it is alleged that, in respect of the transactions in dispute, the Appellant purchased directly from four fraudulent defaulting traders: DFMS (NI) Limited; Erlemo (UK) Limited; Mountain View Motors Limited; and Martin Donnelly, trading as MD Motor Sales Limited. HMRC produced "deal sheets" which, they allege show the connection between the Appellant and these four defaulting traders. In HMRC's evidence details are given of HMRC's attempts to contact these traders and the VAT assessments raised against them which remained unpaid. HMRC has deregistered all four traders as missing traders.

23. Unlike the "classic" MTIC appeals involving mobile phones and computer chips, there were no so-called "buffer" traders between the alleged defaulting trader and the Appellant. The Appellant bought directly from the alleged defaulters.

24. HMRC's evidence was that the Appellant did not meet its suppliers and Ms Wood did not know whether the Appellant met its customers. Ms Wood thought that the suppliers were "probably" contacts of Mr Harte. Control of the transactions was handed over to Mr Paul Donnelly ("Mr Donnelly"), who was neither employed by the Appellant nor had any contractual relationship with the Appellant. Apparently Mr Donnelly was unrelated to Mr Martin Donnelly, one of the defaulting traders. Mr Donnelly was a friend of Mr Harte. Mr Donnelly arranged all customers, suppliers and transport and the Appellant failed to undertake any checks on the transactions that were being conducted.

25. Mr Harte told HMRC that the Appellant had always struggled with its VAT payments. Mr Harte said that he had discussed this with Mr Donnelly who had suggested selling cars to the Republic of Ireland which would have the effect of reducing the Appellant's VAT liability.

26. HMRC's evidence was to the effect that the second-hand car sales by the Appellant, when VAT was disregarded, were affected either at a loss or little or no profit. Furthermore, in 19 transactions third-party payments were received by the Appellant on behalf of the EC customers. Moreover, the Appellant received payment from traders that were suppliers and customers to the Appellant in other transaction chains.

27. HMRC also produced evidence to the effect that on several occasions the Appellant received payment from a third party bank account which was connected with the defaulting trader, DFMS and other suspected missing traders. HMRC reviewed the banking records provided by the Appellant and noted, for example, a sale to a company called Auquis Cars Ltd, but it received payment from a person called Colm McNulty. Ms Wood was asked about this and she commented that she found "everything about the deals unusual."

28. The Appellant received almost identical invoices from its suppliers. The similarities include: the font, font size; style, layout and presentation.

29. According to HMRC, the Appellant purported to purchase a vehicle with the registration plate YK64 CXW. This vehicle was sold twice to the Appellant, once by DFMS on 20 June 2015 and once by Erlemo on 25 November 2015. The same vehicle registration and description appeared on each invoice.

30. HMRC alleged that there was no evidence of any negotiation between the Appellant and its counterparties. There were no contracts and no insurance in respect of any of the goods despite their value. Consequently, there were no formal returns and exchange policies where the goods were found to be faulty or damaged. The Appellant also did not inspect any of the goods before selling them on.

31. Mr Harte informed HMRC that Mr Donnelly was responsible for due diligence checks on its trading counterparties. HMRC claimed that there was no evidence that the Appellant carried out any diligence in respect of its trading counterparties in the transactions under appeal. The only due diligence check, according to Mr Harte, was to check the customer's VAT registration number on the European Commission's website. Had it done so, it would have found that all but one of its eight customers in the Republic of Ireland had been deregistered for VAT purposes. No inspection checks were undertaken on the vehicles by the Appellant.

32. All of the Appellant's transactions involved in the appeal were back-to-back, with the Appellant apparently being able to match suppliers and customers with no difficulty.

33. The VAT registration numbers and telephone numbers on the Erlemo (UK) Limited and Mountain View Motors Limited invoices were the same. The invoices were sent to the Appellant, not by the suppliers, but by Mr Donnelly.

34. The main business of the Appellant involved road tankers where there was direct contact and negotiation/discussions with customers. In relation to the second-hand cars involved in these appeals, the Appellant had no direct contact with customers and there was no evidence of negotiation.

35. The Appellant informed HMRC that funding was not required because the supplier was not paid until payment was received. However, the Appellant suggested that it was undertaking the transactions because Mr Donnelly was unable to fund them himself. However, on a number of occasions, the cars were paid for before the customer paid the Appellant, which was inconsistent with the Appellant's explanation.

Summary of the Appellant's evidence

36. The Appellant's evidence can be summarised as follows, taking each of the Appellant's witnesses in turn.

Mr Harte's evidence

37. Mr Harte said he had known Mr Paul Donnelly for over 30 years and they had previously done business with his family's business for a similar time. Mr Harte had complained about poor cash flow because of quarterly VAT liabilities.

38. A few days later, Mr Donnelly had approached him and suggested undertaking business that would increase the Appellant's profit whilst reducing its problem of quarterly VAT liabilities. Mr Donnelly advised him that there were upmarket used vehicles being exported to the Republic of Ireland from the UK and that he had met a large exporter who would be a potential revenue stream for the Appellant. The Appellant could make a profit of £500 per unit and have reduced VAT liabilities at the end of the quarter. Mr Donnelly said he would handle each transaction and liaise with the Appellant's accounts administrator, Ms Wood, regarding payment. He would ensure payment was made prior to the release of the vehicle.

39. Mr Hart said that he advised Mr Donnelly and Ms Wood to ensure that the VAT numbers corresponded with the invoice details and the information held by HMRC. It was to be checked that the names on the invoices corresponded with the VAT registration numbers supplied. Mr Harte had been present at the Appellant's premises for every visit by HMRC and had ensured the timely supply of information to HMRC.

40. He was shocked and bewildered to learn from HMRC that he had been "caught up a MTIC VAT fraud".

Mr Donnelly's evidence

41. Mr Donnelly, who had known Mr Harte for 30 years, was not an employee of the Appellant. Donnelly Motor Group was a large employer (700 people in Northern Ireland).

42. Mr Donnelly had been introduced to a trader called Colm McNulty in 2015. Mr McNulty was wholesaling slightly used cars in a "booming" Republic of Ireland car market. Mr McNulty said he had been limited in the amount of sales he could do in each three-month period because he could not receive the VAT amount refund on his exports until each the quarter. McNulty asked whether Mr Donnelly knew anyone who could export the cars for him and he would pay them a £500 commission for each export.

43. Mr Donnelly asked Mr Harte whether he would be interested, in a "passing conversation". It was agreed that if the "VAT numbers etc. were verified" it should be satisfactory and would be an additional income stream for the Appellant.

44. Mr McNulty had a number of companies (DFMS (NI), Erlemo (UK), Mountain View and Martin Donnelly). Mr Donnelly confirmed that he was not a relation to Martin Donnelly. Each of those companies invoiced the Appellant. The Appellant (i.e. Ms Wood), as far as Mr Donnelly was aware, "checked all the companies details on the VIES website" and on each occasion the information matched that on the invoice. Mr Donnelly checked the registration numbers of 4 cars and Republic of Ireland number plates were found.

45. He had not heard of MTIC fraud prior to being told by Ms Wood following the Appellant's inspection in May 2016. He did not know that the transactions were connected with fraud.

Ms Wood's evidence

46. Ms Wood was the Appellant's accounts manager. She was asked to make payments by Mr Harte to customers when cleared funds had been sent by purchasers of vehicles being exported to the Republic of Ireland. She exhibited various bank statements to her witness statement showing these payments.

47. The purchase invoices would state the make, model and chassis number of the vehicle. Using this information she would raise a sales invoice. Bank details were provided to her by Mr Harte, or the banking information would be on the invoices. Ms Wood would check the VIES information to ensure VAT numbers, names and addresses of customers and suppliers were valid. She would check to ensure the correct amounts were paid by and to the Appellant. Mr Harte received daily banking updates. Mr Donnelly would be spoken to on occasion about the payments and invoices.

SUBMISSIONS

Submissions for HMRC

48. Essentially, Mr Carey submitted that the Appellant's evidence did not deal with the case that had been advanced by HMRC and that, accordingly, the Appellant's appeal had no prospect of success – it should therefore be struck out.

49. There was no explanation as to why the transactions under appeal were completed with entities that were obviously fraudulent – none of the parties with whom the Appellant dealt were companies known to the Appellant which was, in any event, in a different line of business. The Appellant appeared to have surrendered control of this part of its business to Mr Harte and Mr Donnelly. There was no credible or realistic explanation as to why there was no appropriate due diligence being done.

50. The only explanation for the transactions, Mr Carey submitted, was that it could affect the Appellant's VAT liability. Furthermore, there was no attempt by Ms Wood to explain her comment that she found "everything about the deals unusual".

51. The objective factors advanced by HMRC in their evidence and the comments made by Ms Wood and Mr Harte during the course of HMRC's enquiry demanded answers. However, the Appellant's evidence left these matters entirely unchallenged by way of a competing version of events or a suggestion that HMRC may have misunderstood the way in which the transactions were taking place.

52. There was, therefore, Mr Carey contended, overwhelming evidence that the transactions that were being conducted were done in a way consistent with MTIC fraud. Mr Carey submitted that the Appellant had not demonstrated any conviction in the evidence in support of its appeal and that there was no realistic prospect of resisting HMRC's case.

53. There was no analysis put forward by the Appellant as to why it did not know nor should have known that its transactions were connected with the fraudulent evasion of VAT.

In addition, it would have been expected that the Appellant would tender an explanation as to how it could be that the Appellant continue to find itself trading directly with fraudulent defaulting traders.

54. The Appellant had maintained its defence and its inadequate evidence for more than a year i.e. since the present application had been filed. The Appellant had chosen not to apply in that time to adduce further evidence, leading to the inference that it did not have any further evidence to put forward in support of its appeal.

55. The Appellant's evidence was so minimal and fell so far short of dealing with the case put forward by HMRC that this appeal was not one that needed to be dealt with at trial.

Submissions for the Appellant

56. Mr Brown, appearing for the Appellant, drew attention to the fact that HMRC had not complied with Directions 5 and 6. Consequently, Direction 8 had not been "triggered". This required the Appellant to specify its position on various issues.

57. In Mr Brown's submission, this was sufficient for HMRC's application to be refused. This Tribunal could not take a view on the strength of the Appellant's case if it had not yet been required to put that case forward in accordance with the Directions.

58. It was necessary, Mr Brown contended, for HMRC to prove the four following matters:

(1) that there has been a tax loss;

(2) the tax loss was occasioned by fraud;

(3) that the Appellant's transactions were connected to that fraudulent tax loss; and

(4) that the Appellant knew or should have known that its transactions were so connected.

59. Usually, matters (1) and (2) were matters on which the Appellant would have no knowledge and would not usually produce evidence. It was HMRC that had to (and did usually) produce evidence on these points. It was only when all the evidence had been adduced that the Appellant could assess whether there had been a fraudulent tax loss. HMRC's failure to comply with Directions 5 and 6 meant that the appeal must be allowed to continue.

60. Mr Brown complained that Mr Carey had, by sifting through the evidence, effectively invited this Tribunal to conduct a "mini-trial", whilst Mr Carey had recognised that conducting a "mini-trial" was not an appropriate procedure in the case of an application under Rule 8. The Tribunal would have to take an objective view of Mr Harte's and Mr Donnelly's actions. The Tribunal would have to take account of all the circumstances.

61. Mr Donnelly's evidence, Mr Brown said, provided an explanation as to what had happened. He had said that Mr McNulty needed someone who could export the cars and Mr Harte agreed to this if the relevant details were verified. HMRC could cross-examine Mr Harte and Mr Donnelly on what they said in their witness statements. It would only be then that the Tribunal had an account of all the circumstances which would enable it to reach a final decision.

62. The decision in *First De Sales* at [33(vi)] indicated that this Tribunal should, in Mr Brown's submission, hesitate about making a final decision without a trial. The evidence of Mr Donnelly and Mr Harte, in particular Mr Donnelly's statement that he was unaware of MTIC fraud, raised questions which required to be dealt with in cross-examination. Similarly, the evidence relating to telephone numbers and whether vehicles have been sold twice needed

to be explored in cross-examination. It was not appropriate to reach a conclusion on these matters now.

Reply by HMRC

63. In any judicial proceedings it was possible for a court or tribunal to strike out proceedings which disclose no real prospect of success.

64. As regards, the Appellant's complaint that HMRC were inviting the Tribunal to conduct a "mini-trial", *First De Sales* at [33 (iv)] was authority for the proposition that this Tribunal did not need to take everything said by the Appellant's at face value. There were a number, of what Mr Carey described as, "red flags" in HMRC's evidence which should have indicated to the Appellant that its transactions were connected with fraud. The Appellant's evidence did not address these issues.

65. Moreover, Mr Carey argued that there was no authority for the proposition that a case could not be struck out unless the Tribunal heard cross-examination.

APPELLANT'S APPLICATION TO ADDUCE FURTHER EVIDENCE

66. Mr Brown applied orally at the hearing, in the course of his submissions, for permission for the Appellant to adduce further evidence from its three witnesses in order to address some of the issues raised by HMRC in their application.

67. Mr Carey resisted this application. He argued, first, that there was no need to do so because on the Appellant's case the evidence which the Appellant had already produced gave it a more than fanciful chance of success. Secondly, there was no evidence that could not have been adduced initially in accordance with the Directions. Instead, the Appellant chose not to adduce this evidence.

THE TRIBUNAL RULES

68. Rule 8 of The Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009 (the "Tribunal Rules") sets out the circumstances in which the Tribunal may strike out the whole or part of proceedings. HMRC's application was made on the basis of Rule 8(3)(c):

> "8. Striking out a party's case
>
> …
>
> (3) The Tribunal may strike out the whole or a part of the proceedings if—
>
> (a) the appellant has failed to comply with a direction which stated that failure by the appellant to comply with the direction could lead to the striking out of the proceedings or part of them;
>
> (b) the appellant has failed to co-operate with the Tribunal to such an extent that the Tribunal cannot deal with the proceedings fairly and justly; or
>
> (c) the Tribunal considers there is no reasonable prospect of the appellant's case, or part of it, succeeding."

69. The power to strike out proceedings must be exercised in accordance with the overriding objective in rule 2 of the Tribunal Rules:

> "2. Overriding objective and parties' obligation to co-operate with the Tribunal
>
> (1) The overriding objective of these Rules is to enable the Tribunal to deal with cases fairly and justly.
>
> (2) Dealing with a case fairly and justly includes—

(a) dealing with the case in ways which are proportionate to the importance of the case, the complexity of the issues, the anticipated costs and the resources of the parties;

(b) avoiding unnecessary formality and seeking flexibility in the proceedings;

(c) ensuring, so far as practicable, that the parties are able to participate fully in the proceedings;

(d) using any special expertise of the Tribunal effectively; and

(e) avoiding delay, so far as compatible with proper consideration of the issues.

(3) The Tribunal must seek to give effect to the overriding objective when it—

(a) exercises any power under these Rules; or

(b) interprets any rule or practice direction.

(4) Parties must—

(a) help the Tribunal to further the overriding objective; and

(b) co-operate with the Tribunal generally."

STRIKE OUT APPLICATIONS - THE TESTS TO APPLY

70. As noted above, the power to strike out a ground of appeal under Rule 8(3)(c) must be exercised in accordance with the overriding objective.

71. The Upper Tribunal (Carr J and Judge Sinfield) in *The First De Sales Limited Partnership and others v HMRC* [2018] UKUT 396 (TCC) ("*First De Sales*") (at [33]) gave helpful guidance in relation to strike out applications:

> "Although the summary in *Fairford Group Plc*[2] is very helpful, we prefer to apply the more detailed statement of principles in respect of application for summary judgment set out by Lewison J, as he then was, in *Easyair Ltd (t/a Openair) v Opal Telecom Ltd* [2009] EWHC 339 (Ch) at [15]. This was subsequently approved by the Court of Appeal in *AC Ward & Sons v Caitlin Five Limited* [2009] EWCA Civ 1098. The parties to this appeal did not suggest that any of these principles were inapplicable to strike out applications.
>
> "i) The court must consider whether the claimant has a 'realistic' as opposed to a "fanciful' prospect of success: *Swain v Hillman* [2001] 1 All ER 91
>
> ii) A 'realistic' claim is one that carries some degree of conviction. This means a claim that is more than merely arguable: *ED & F Man Liquid Products v Patel* [2003] EWCA Civ 472 at [8]
>
> iii) In reaching its conclusion the court must not conduct a 'mini-trial': *Swain v Hillman*
>
> iv) This does not mean that the court must take at face value and without analysis everything that a claimant says in his statements before the court. In some cases it may be clear that there is no real substance in factual assertions made, particularly if contradicted by contemporaneous documents: *ED & F Man Liquid Products v Patel* at [10]

[2] *HMRC v Fairford Group* [2015] STC 156

> v) However, in reaching its conclusion the court must take into account not only the evidence actually placed before it on the application for summary judgment, but also the evidence that can reasonably be expected to be available at trial: *Royal Brompton Hospital NHS Trust v Hammond (No 5)* [2001] EWCA Civ 550
>
> vi) Although a case may turn out at trial not to be really complicated, it does not follow that it should be decided without the fuller investigation into the facts at trial than is possible or permissible on summary judgment. Thus the court should hesitate about making a final decision without a trial, even where there is no obvious conflict of fact at the time of the application, where reasonable grounds exist for believing that a fuller investigation into the facts of the case would add to or alter the evidence available to a trial judge and so affect the outcome of the case: *Doncaster Pharmaceuticals Group Ltd v Bolton Pharmaceutical Co 100 Ltd* [2007] FSR 63
>
> vii) On the other hand it is not uncommon for an application under Part 24 to give rise to a short point of law or construction and, if the court is satisfied that it has before it all the evidence necessary for the proper determination of the question and that the parties have had an adequate opportunity to address it in argument, it should grasp the nettle and decide it. The reason is quite simple: if the respondent's case is bad in law, he will in truth have no real prospect of succeeding on his claim or successfully defending the claim against him, as the case may be. Similarly, if the applicant's case is bad in law, the sooner that is determined, the better. If it is possible to show by evidence that although material in the form of documents or oral evidence that would put the documents in another light is not currently before the court, such material is likely to exist and can be expected to be available at trial, it would be wrong to give summary judgment because there would be a real, as opposed to a fanciful, prospect of success. However, it is not enough simply to argue that the case should be allowed to go to trial because something may turn up which would have a bearing on the question of construction: *ICI Chemicals & Polymers Ltd v TTE Training Ltd* [2007] EWCA Civ 725."

72. The Upper Tribunal continued at [74]:

> "The issue concerning section 225 ITEPA 2003 gave rise to a short point of construction. The FTT, correctly in our judgment, was satisfied that it had before it all the evidence necessary for the proper determination of the question and that the parties had an adequate opportunity to address it in argument. The Appellants' evidential case was, in our view, hopeless, based on the evidence before the FTT. The FTT was right to conclude it is not enough simply to argue that the case should be allowed to go to trial because something may turn up which would have a bearing on the question of construction."

73. In the decision of the Upper Tribunal in *HMRC v Fairford Group* [2015] STC 156 (Simon J and Judge Bishopp) ("*Fairford*"), referred to by the Upper Tribunal in *First De Sales*, held at [41] that the First-tier Tribunal should consider a strike out application under Rule 8(3)(c) in a similar way to an application under CPR 3.4 in civil proceedings. *Fairford*, like the present case, was what is called an MTIC appeal involving the application of the *Kittel* principle. However, in that case the taxpayer did not accept that there was a tax loss or that it resulted from fraudulent evasion and at least in one case did not accept that its transactions were connected to the fraudulent evasion of VAT. The FTT concluded that those matters had to be determined at a substantive hearing and refuse the application to strike out the taxpayer's appeal. The Upper Tribunal upheld the FTT's decision. First, at [30], the

Upper Tribunal rejected the argument advanced on behalf of the taxpayer that the strike out power in Rule 8(3)(c) did not arise where there was no positive case being advanced by the taxpayer and where, instead, the taxpayer was simply putting HMRC to proof i.e. the strike out power in Rule 8(3)(c) could only apply to cases where the appellant bore the burden of proof:

> "… The FTT has the power to strike out a part of the proceedings if it concludes that there is no reasonable prospect of all or part of an appellant's case succeeding. A party's case is not confined to its positive case, nor to a form of pleading. Although Rule 8(3)(c) is in different terms, the parties (rightly in our view) accepted that CPR Part 3.4, which applies to the formal statements of case which are served in civil proceedings, was a helpful source of guidance on the proper application of Rule 8(3)(c). CPR Part 3.4(2)(a) confers a power to strike out a statement of case, including a defence, even where the burden of proof is on the Claimant; and it would be surprising if it were otherwise. The Court's powers may be exercised if a defence is vague, evasive, incoherent or obviously ill-founded, although in such cases the objectionable nature of the party's case can often be cured by amendment or further particulars."

74. The Upper Tribunal continued at [48]:

> "An appellant who advances a positive case will be required, by virtue of other customary directions, to set it out in witness statements or, if that is not practicable, in a response or a letter, or in some similar way. Accordingly, an appellant putting a positive case must disclose his hand in advance; we see no reason why one merely putting HMRC to proof should be in a better position. If there is a real challenge to HMRC's evidence it should be identified; if there is not, the evidence should be accepted. We see no reason why an appellant who does not advance a positive case should be entitled to require HMRC to produce witnesses for cross-examination when their evidence is not seriously disputed. Such a course is wasteful not only of HMRC's resources but also of the resources of the FTT, since it increases the length of hearings and adds to the delays experienced by other tribunal users."

75. In *Three Rivers District Council v Governor and Company of the Bank of England (No 3)* [2001] UKHL 16 the House of Lords provided guidance on how an application for summary judgment should be determined. Lord Hope said:

> "94. … I think that the question is whether the claim has no real prospect of succeeding at trial and that it has to be answered having regard to the overriding objective of dealing with the case justly. But the point which is of crucial importance lies in the answer to the further question that then needs to be asked, which is - what is to be the scope of that inquiry?
>
> 95. I would approach that further question in this way. The method by which issues of fact are tried in our courts is well settled. After the normal processes of discovery and interrogatories have been completed, the parties are allowed to lead their evidence so that the trial judge can determine where the truth lies in the light of that evidence. To that rule there are some well-recognised exceptions. For example, it may be clear as a matter of law at the outset that even if a party were to succeed in proving all the facts that he offers to prove he will not be entitled to the remedy that he seeks. In that event a trial of the facts would be a waste of time and money, and it is proper that the action should be taken out of court as soon as possible. In other cases it may be possible to say with confidence before trial that the factual basis for the claim is fanciful because it is entirely without substance. It may be clear beyond question that

> the statement of facts is contradicted by all the documents or other material on which it is based. The simpler the case the easier it is likely to be take that view and resort to what is properly called summary judgment. But more complex cases are unlikely to be capable of being resolved in that way without conducting a mini-trial on the documents without discovery and without oral evidence. As Lord Woolf said in *Swain v Hillman*, at p 95, that is not the object of the rule. It is designed to deal with cases that are not fit for trial at all.
>
> 96. In *Wenlock v Moloney* [1965] 1 WLR 1238 the plaintiff's claim of damages for conspiracy was struck out after a four day hearing on affidavits and documents. Danckwerts LJ said of the inherent power of the court to strike out, at p 1244B-C:
>
> > "… this summary jurisdiction of the court was never intended to be exercised by a minute and protracted examination of the documents and facts of the case, in order to see whether the plaintiff really has a cause of action. To do that is to usurp the position of the trial judge, and to produce a trial of the case in chambers, on affidavits only, without discovery and without oral evidence tested by cross-examination in the ordinary way. This seems to me to be an abuse of the inherent power of the court and not a proper exercise of that power."
>
> Sellers LJ said, at p 1243C-D, that he had no doubt that the procedure adopted in that case had been wrong and that the plaintiff's case could not be stifled at that stage, and Diplock LJ agreed."

DISCUSSION

The strike out application

76. In my view, HMRC's application must be refused.

77. I accept that the evidence put forward by the Appellant is sparse. Since my decision is that this appeal should not, at this stage, but struck out and therefore should go forward to a substantive hearing, I shall carefully restrict my comments on the evidence in order not to influence, in any way, the outcome of that hearing.

78. In *First De Sales* the Upper Tribunal quoted and adopted the judgment of Lewison J, as he then was, in *Easyair Ltd (t/a Openair) v Opal Telecom Ltd* [2009] EWHC 339 (Ch) at [15]. The passage, at vi), is particularly relevant:

> "vi) Although a case may turn out at trial not to be really complicated, it does not follow that it should be decided without the fuller investigation into the facts at trial than is possible or permissible on summary judgment. Thus the court should hesitate about making a final decision without a trial, even where there is no obvious conflict of fact at the time of the application, where reasonable grounds exist for believing that a fuller investigation into the facts of the case would add to or alter the evidence available to a trial judge and so affect the outcome of the case: *Doncaster Pharmaceuticals Group Ltd v Bolton Pharmaceutical Co 100 Ltd* [2007] FSR 63"

79. In this case, because HMRC has failed to comply with Directions 5 and 6, with the result that the Appellant has not been called upon to comply with Direction 8, and therefore it is not clear on what basis the Appellant argues its appeal. I accept that the Appellant's Notice of Appeal seems to focus on the knowledge (or means of knowledge) of the Appellant, but frequently in this Tribunal the grounds of appeal, when an appeal is first lodged, are often general in nature. In any event, the Directions appear to envisage that any or all of the following issues could be involved in the appeal.

80. As Mr Brown correctly identified, HMRC must prove the following four issues:

(1) that there has been a tax loss;

(2) the tax loss was occasioned by fraud;

(3) that the Appellant's transactions were connected to that fraudulent tax loss; and

(4) that the Appellant knew or should have known that its transactions were so connected.

81. It is possible that issues (1) and (2) remain in dispute. These are not matters on which the Appellant would normally be expected to produce evidence. As in *Fairford*, I do not think it is correct for me to take a decision on these two issues at this stage i.e. in a strike out application.

82. As regards issue (3), since the evidence is that the Appellant bought directly from the alleged defaulting traders, it is unlikely that this will be in issue, but I express no further view on this point.

83. As regards issue (4), the question of knowledge or means of knowledge in an MTIC context is one which requires this Tribunal carefully to weigh all the evidence and consider all the relevant circumstances. I think, therefore, that issue (4) is unlikely to be one which is suitable in most cases to be determined in summary proceedings and without the benefit of hearing all the evidence at a full hearing.

84. I, therefore, refuse HMRC's application. I shall amend the Directions.

The Appellant's application to adduce further evidence

85. It seemed to me, that this application was something of an afterthought in Mr Brown's submissions, no such application having been made in his skeleton argument.

86. Be that as it may, I refuse the application.

87. In the first place, no detail was given as to the nature of the evidence which Mr Brown sought to admit. No copies of draft or executed witness statements were produced. There was, therefore, no clear indication as to what matters this further evidence would address.

88. Secondly, there was no explanation why this extra evidence could not have been adduced at the appropriate time in compliance with Direction 4.

89. I think it is important that parties should understand that Directions of this Tribunal should be complied with in full. It is particularly important for the efficient case management and conduct of an appeal that evidence should be produced in a timely fashion and in compliance with this Tribunal's Directions. The production of witness statements and exhibits is not, beyond that set out in the Directions, an iterative process whereby additional evidence can be produced as and when a party to proceedings "gets round to it". That simply prolongs proceedings, increases costs and wastes time. It seems to me that this would be the negation of the overriding principle that cases should be dealt with fairly and justly. There is no suggestion – certainly none was made to me – that the Appellant was in some way prevented from adducing evidence in compliance with Direction 4. Therefore, the Appellant's application to adduce additional evidence is refused.

CONCLUSION

90. I refuse HMRC's strike out application and I refuse the Appellant's application to adduce further evidence. I shall amend the Directions.

RIGHT TO APPLY FOR PERMISSION TO APPEAL

91. 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.

GUY BRANNAN
TRIBUNAL JUDGE

Release date: 29 JANUARY 2021