



TC01557

Appeal number: LON/2008/1475

*CASE MANAGEMENT – Admission of late evidence – MTIC APPEAL –
Balancing exercise – Trib Procedure (First-tier Tribunal) (Tax Chambers)
Rules 2009 r.2 and 15(2)(b)*

FIRST-TIER TRIBUNAL

TAX

HAWKEYE COMMUNICATIONS LTD

Appellant

- and -

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

Respondents

TRIBUNAL: JUDGE THEODORE WALLACE

Sitting in public in London on 1 and 2 September 2011

**Abbas Lakha QC and Max Hardy, instructed by Jeffrey Green Russell, for the
Appellant**

Jonathan Hall, instructed by the Solicitor, for the Respondents

DECISION

1. This decision concerns six out of 29 directions released on 22 September 2011 in respect of which the Appellant has requested reasons with a view to an appeal.

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2. The particular directions in question allowed the following statements to be admitted : Roderick Guy Stone dated 15 May 2011, excluding one sentence; Thomas Hjannung dated 29 June 2011; Vivian Barbara Parsons dated 10 February 2011, paragraphs 1-6; Peter Birchfield dated 20 May 2011; various paragraphs of Judith Elizabeth Clifford dated 19 May 2011; Michael Mercer dated 7 April 2011 and Nigel Humphries dated 4 May 2011.

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3. The Notice of Appeal was served on 30 June 2008 against a decision on 12 June 2008 denying input tax of £317,957 claimed on the purchase of mobile phones in period 08/06. The claim was refused on the grounds that the Appellant knew or should have known that its purchases were via contra traders connected to fraud, see *Kittel v Belgium* [2008] STC 1537, ECJ.

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4. The Statement of Case by the Respondents was served on 28 August 2008.

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5. Agreed directions were given by the Tribunal on 20 November 2008 requiring the Respondents to serve their witness statements by 10 February 2009 followed by sequential service of statements leading up to the Appellant's statements in reply by 10 August 2009 to the Respondents' statements in reply. Direction 8 provided that no further evidence was to be served without leave.

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6. A series of extensions were given to both parties before a pre-trial review on 19 July 2010 when it was directed by agreement that no further evidence be filed by the Respondents and no further evidence be filed by the Appellant after 1 September 2010; it was directed that the appeal be set down for 7 to 8 days before 1 May 2011. The Appellant was given extensions to 1 October, 15 October and 3 December 2010.

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7. On 14 February 2011 the Appellant applied to exclude statements by John Fletcher and Mr Stone which had been previously admitted and to edit other statements.

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8. The Respondents objected and on 20 May 2011 applied to adduce the statements which are the subject of this decision together with other statements, including an earlier statement by Thomas Hjannung dated 23 March 2011.

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9. Notwithstanding the direction limiting the time for service of witness statements going back to that of 20 November 2008 and that of 19 July 2010 which was not qualified, the Tribunal clearly has power to vary the directions to permit further evidence.

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10. Under Rule 2 of the Tribunal Procedure (First-tier Tribunal)(Tax Chamber) Rules 2009 when exercising any power the Tribunal must seek to give effect to the

5 overriding objective. This includes under Rule 2(2)(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. Rule 15(2)(b) gives specific power to exclude evidence where it was not provided within the time allowed by a direction.”

10 11. When considering an application to admit further evidence the Tribunal must carry out a balancing exercise. This involves the prejudice to the respective parties if the evidence is allowed or permitted, whether the evidence introduces new matters which have not been pleaded or raised, whether it is proportionate to the issue, the conduct of the parties and its effect on the progress of the appeal.

15 12. It is important to note in this case that no date has been fixed for the trial. There is thus no question of a trial date having to be vacated.

20 13. It was however most unsatisfactory that on 20 May 2011 the Respondents sought leave to adduce no fewer than 11 statements of which six were from new witnesses, when the pre-trial review on 19 July 2010 had been conducted on the basis that no further evidence was to be served by the Respondents and when dates to avoid for the trial were directed to be given by 26 July 2010.

25 14. In their application of 20 May the Respondents cited Lightman J in *Mobile Export 365 Ltd v Revenue and Customs Commissioners* [2007] STC 1794 where he said this at [20],

“The presumption must be that all relevant evidence should be admitted unless there is a compelling reason to the contrary.”

30 If this was applied literally it would make effective case management impossible, except on the footing that the need for effective case management is a compelling reason. Furthermore the question whether evidence should be admitted often involves “a very difficult and finely balanced judgment,” see Lord Bingham in *O’Brien v Chief Constable of South Wales Police* [2005] 2 WLR 1038, HL which was not cited in *Mobile Export 365*. In my judgment Lord Bingham’s observations were not limited to similar fact evidence.

35 15. The directions given at the present hearing excluded two statements including Mr Stone’s initial generic statement and excluded part of others statements.

40 16. I now turn to the individual statements for which reasons have been requested.

Roderick Guy Stone of 15 May 2011

45 17. This consists of three pages with exhibits and concerned the relationship between the Appellant and its supplier, Unique Distribution Ltd, which was referred to in a statement by Mr Patel for the Appellant dated 8 December 2010. I accepted the submission by Mr Hall that it is relevant because it concerns goods supplied by

Unique Distribution Ltd to the Appellant. No reason was advanced as to why there was a delay of five months in applying to admit this evidence, however no trial date has been fixed and Mr Lakha did not identify any prejudice beyond lateness.

5 Thomas Hjannung dated 29 June 2011

18. This statement consists of 8 pages with exhibits. The statement (which was served after the application of 20 May 2011) is by the director finance of Bang & Olufsen Group at the relevant time and provides information regarding the availability of Samsung Serene Mobile telephones supplied by Future Communications to the Appellant in alleged buffer deals, referred to in the 2008 Statement of Case at paragraph 26.1. Apart from lateness and the fact that Mr Hjannung is a completely new witness, no further prejudice was identified beyond assisting the Respondents' case.

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Vivien Barbara Parsons dated 10 February 2011

19. The 6 paragraphs admitted cover further assessments raised against Wade Tech Ltd since her first statement dated 31 March 2009. Wade Tech Ltd was the defaulter in contra chains. This was simply updating evidence in effect correcting her first statement. Again no prejudice was identified apart from lateness.

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Peter Birchfield dated 20 May 2011

20. This statement consists of 20 pages and 1235 pages of exhibits. It exhibits material from the Dutch and Paris servers covering the First Curacao International Bank ("FCIB") where the Appellant held an account which it used for its "buffer" deals but not its "broker" deals. The buffer deals form part of what the Respondents allege to be a fraudulent scheme involving Future Communications Ltd ("Future"), the contra trader in this appeal.

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21. Mr Hall said that paragraphs 81 and 82 provided evidence of contrivance in the buffer deals involving the Appellant between 9 and 12 May 2006; he said that it was no accident that the Appellant paid the correct people in the money loops. He said extracting the material from the services was a complicated exercise which had to be prioritised.

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22. Mr Lakha said that there was no apology or explanation as to why this evidence was so late. The statement was primarily based on evidence from the Dutch server which was available to the Respondents in August 2008. He said that the Appellant was prejudiced because it would be necessary to look to see whether the evidence as to flows of money was accurate and the raw data might have to be considered to see whether it was corrupted, The Appellant had never used its FCIB account in broker transactions. The repayment claimed was relatively small; it was not proportionate to permit extensive new evidence at this stage. It was disproportionate in terms of the time, expense and effort which it would involve for the Appellant and would impact on the trial date.

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23. Mr Birchfield is a new witness. This evidence involved particularly careful consideration in view of its extent and its lateness. If a trial date had been fixed, it might well not have been admitted. Its admission should not have any major impact on a trial date. It is however significant evidence and I do not consider the time and expense involved for the Appellant in considering it to be decisive in this case.

Judith Elizabeth Clifford dated 19 May 2011

24. This statement concerns Future, a contra-trader. The statement consists of 20 pages with 117 paragraphs, of which 86 were admitted by the direction, and a considerable number of exhibits.

25. The paragraphs admitted up to paragraph 24 involve corrections to her earlier statement which would otherwise have been necessary at the outset of her oral evidence; the second reference to paragraph 21 in direction (17) is an error for paragraph 22.

26. The statement exhibits further transaction information which is analysed in Michael Mercer's statement. It covers acquisition chains by Future and tax loss transaction chains with a profit analysis of tax loss transaction chains and other characteristics of Future's deals indicating contrivance.

27. Paragraphs 81-4 cover Future's transactions with the Appellant and 85-6 update the officer's first statement.

28. Paragraph 88 onwards are based on FCIB material, including money loops involving the Appellant.

29. Mr Hall said that officer Clifford's statement provides evidence of Future's dishonesty.

30. Mr Lakha submitted that the Respondents were aware months earlier of the need to collate and serve this evidence; their wilful dilatoriness should not be rewarded.

31. The paragraphs admitted by the direction exclude comments and contain corrections and updating. There is some new evidence however this is not disproportionate given that much of the statement was not admitted.

Michael Mercer dated 7 April 2011

32. This statement is of 8 pages demonstrating how charts exhibited by Officer Clifford were produced.

33. The only objection made by Mr Lakha was to the lateness of this material which was produced on instructions from Officer Clifford, the latest instruction being on 16 November 2010.

34. This material might well not have been admitted in evidence if a trial date had been fixed and would be affected. However no date has been fixed and on balance I decided that it should be allowed.

5 Nigel Humphries dated 4 May 2011

35. This was a short statement to which Mr Lakha made no specific objection apart from the general objection as to lateness. It concerned exchange of information with the German tax authorities however it did not exhibit any such information.

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Conclusion

36. As stated at the outset this decision concerns the direction allowing the Respondents to serve evidence by seven witnesses at a late stage 10 months after the pre-trial review. Apart from a balancing exercise in respect of individual statements, it involved a balancing exercise in the direction as a whole. As a result of the directions a substantial reduction was made in the new evidence. The practice which has been followed in this case of directing that witness statements stand as evidence in chief subject to cross-examination, has the effect that unless the trial is to be disrupted any objection to evidence should be taken before the trial. A disadvantage of this is the need for lengthy directions hearings as happened here when the hearing took two full days, compared with the time estimate at the pre-trial review of 7 to 8 days for the full trial.

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

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**THEODORE WALLACE
TRIBUNAL JUDGE
RELEASE DATE: 9 November 2011**

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