[2016] UKFTT 0261 (TC)

TC05036

Appeal number: TC/2014/06344

PROCEDURE – MTIC appeal – Fairford directions – Revenue and Customs Commissioners v Fairford Group plc (in liquidation) and another considered

FIRST-TIER TRIBUNAL
TAX CHAMBER

C F BOOTH LIMITED **Appellant**

- and -

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

TRIBUNAL: JUDGE ROGER BERNER

Sitting in public at The Royal Courts of Justice, Strand, London WC2 on 11 April 2016

Tarlochan Lall, instructed by Keystone Law, for the Appellant

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

DECISION

1. This is my decision on one aspect of the directions I have made for the future case management of this appeal. The appeal, which is a consolidated appeal, is against both an assessment to VAT and a decision of HMRC denying deductibility of input tax in respect of a number of VAT accounting periods of the appellant ("CFBL"). The background is summarised in an earlier published decision in these appeals, under citation number [2015] UKFTT 0407 (TC), at [2] to [8], which I need not repeat.

2. There are two principal areas of dispute. One is whether the evidence provided by CFBL in relation to certain purported supplies made by CFBL is sufficient to support the zero-rating of those supplies; I am not concerned with that for present purposes. The other, which has given rise to argument as to the proper approach to be adopted in this case, is HMRC's case that, in relation to all the supplies in question, those transactions were connected to the fraudulent evasion of VAT and that CFBL knew or should have known of that connection, commonly described as an MTIC case.

3. The parties differed as to the approach to be taken in respect of what have come to be termed as "Fairford directions", after the helpful guidance given by the Upper Tribunal in *Revenue and Customs Commissioners v Fairford Group plc (in liquidation) and another* [2015] STC 156. That decision is therefore the appropriate starting point.

Fairford

4. *Fairford*, which was also an MTIC case, came before the Upper Tribunal (Simon J and Judge Bishopp) on an appeal from a case management decision of the First-tier Tribunal ("FTT") refusing to strike out part of the taxpayers' appeals on the ground that all the substantial facts relating to tax loss and its fraudulent nature (and in one deal the taxpayer's connection with the fraudulent evasion of VAT) had been disclosed by HMRC, the evidence was "overwhelming" and that there was no prospect of the taxpayers successfully disputing those facts or oral evidence affecting the FTT's assessment of them.

5. The Upper Tribunal dismissed HMRC's appeal, finding that the FTT had not erred in law or in the exercise of its discretion either in its analysis or in its conclusion.

6. The Upper Tribunal then went on to give guidance as to the approach to be taken to case management of such cases. It rejected, at [45], a submission by counsel for the taxpayers that it might be necessary to cross-examine the HMRC witnesses as to evidence that there was a tax loss and that it resulted from a fraudulent evasion of VAT "in order to highlight various matters in the evidence". It also rejected the suggestion that the question whether witnesses were to be required for cross-

examination was something that could be left until the time of the full hearing, mirroring, it had been suggested, a practice in the Crown Court.

7. The Upper Tribunal instead, at [46], endorsed, as consonant with the parties' obligations in accordance with the overriding objective (Rule 2 of the FTT's Rules[1]), the approach of early clarification of the issues in dispute and the witnesses who were required for cross-examination. It provided, at [47], what it described as a "typical form of directions used by the FTT in this type of case":

> "The Appellant shall notify the Respondents and the Tribunal of the issues in dispute in this appeal by no later than [DATE] and in particular shall confirm whether it disputes:
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> • Whether the Appellant accepts the transaction chains as set out in the deal sheets produced by HMRC in relation to the Appellant's purchases on which HMRC 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;
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> • Whether the Appellant accepts (without making any admission of knowledge or means of knowledge) that the Appellant's transactions were part of an orchestrated fraud;
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> • 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;
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> • Whether, in respect of chains where the alleged connection to an alleged default is via an alleged contra-trader, the Appellant accepts its transactions were connected to fraudulent tax loss."

8. The Upper Tribunal identified that, whereas the first bullet point of the "typical" directions required the appellant to identify the basis on which it disputed, or did not accept, the transaction chains as set out in deal sheets furnished by HMRC, no such stricture was incorporated in regard to the remaining three bullet points. The Upper Tribunal said (at [48]):

> "In our view the appellant should additionally be required to provide reasons if the answer to any of the second, third and fourth of those questions is No. 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

[1] Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009.

> 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."

9. The Upper Tribunal then considered the consequence of an appellant raising no positive case or otherwise identifying the respects in which the witness evidence referable to the four factors comprised in the directions was disputed. It said (at [48]):

> "In our view the FTT should also direct that if an appellant raises no positive case, serves no evidence challenging the evidence of HMRC's witnesses, and does not identify the respects in which the statements of those of HMRC's witnesses who deal only with the questions set out at [47], above are disputed, then their evidence can be given, and will be accepted by the tribunal, in the form of a written statement under r 15(1) of the FTT Rules (see also r 5(3)(f)), and that cross-examination of that witness will not be permitted."

Discussion

10. The guidance of the Upper Tribunal is rooted in the tribunal's overriding objective, namely to deal with cases fairly and justly, and in that context 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. Notwithstanding that in MTIC cases the burden of proof lies with HMRC, an appellant who does nothing more than put HMRC to proof will not be entitled to cross-examine those witnesses for HMRC who give evidence in relation to certain aspects of the case.

11. Whilst endorsing that principle, the Upper Tribunal cannot have intended to set a template for the direction to be made by the FTT. The example given by the Upper Tribunal may have been typical, but it was not regarded as comprehensive by the tribunal, and it is in any event flawed in its drafting: the reference to "whether [the Appellant] disputes" in the preamble sits uncomfortably with the use of "whether … the Appellant accepts". That is not merely a pedantic point: there was some debate before me as to whether the directions should be drafted by reference to acceptance or dispute.

12. Nor can it have been the intention of the Upper Tribunal to commoditise MTIC appeals. Each such appeal must be considered on its own merits, and the case management process must have regard to the particular circumstances of each appeal. Whilst proportionality is an important factor in the achievement of the tribunal's overriding objective, and it would be wrong to permit a waste of resources, fairness and justice dictate an approach that focuses on the individual case before the tribunal.

13. Two aims can be discerned in the approach adopted by the Upper Tribunal. The first is that the appellant, as well as HMRC, should set out its case whether it advances a positive case or is merely putting HMRC to proof. HMRC is entitled to know which of the issues is in dispute, and the basis on which the relevant issues are disputed. The second is that if the appellant makes no positive case with respect to the issues specified in the directions, serves no evidence which challenges the

evidence of HMRC's witnesses in those respects and does not identify the areas of dispute in that evidence, then the appellant will not be entitled to cross-examine those witnesses, whose witness statements will be accepted by the tribunal.

14. For such an appellant, that process will not be prejudicial. Acceptance of, or failure to dispute, the underlying facts will not inhibit an appellant from making submissions as to the inferences to be drawn from those facts and the conclusions that may be reached. Tribunals will be astute to the difference between the factual evidence contained in a witness statement and inferences and conclusions that may be contained within it. The latter are not properly part of the evidence of a witness of fact; to the extent they are contained in a witness statement they should be disregarded and it is not necessary for the witness to be cross-examined in those respects.

15. On the other hand, as the Upper Tribunal recognised, cross-examination is not dependent on the appellant having made a positive case or having served evidence in rebuttal. All that is required is identification of the respects in which the evidence is disputed. There may be many legitimate reasons why a party who is not itself in possession of contrary evidence might wish to cross-examine the witnesses of the other party. There might be internal inconsistencies in the witness statement, inconsistencies with other evidence put forward by that other party in the case or in other cases. There might be omissions of fact where something might be expected. Where the facts deposed to are not within the actual knowledge of the witness but are the product of research or investigation, by the witness or possibly by others, there might be questions as to the nature of such investigation or research. It would be wrong to place any obstacles in the way of an appellant wishing to test the evidence of HMRC in that way, and it would deprive the tribunal of the benefit of having heard that evidence being so tested.

16. It is important, therefore, that the directions are not over-prescriptive so as to lead to an appellant being deprived of an opportunity to cross-examine those witnesses whose evidence is genuinely a matter of dispute, whatever the nature of that dispute. The directions should not be oppressive. The modern approach to case management is, as is well-established, one of "cards face up on the table", but that does not mean that a party should be obliged to disclose in advance its line of questioning in cross-examination. It is enough, as the Upper Tribunal indicated at [49], that the appellant identify the respects in which the relevant witness statements are disputed or, I would say, not accepted. There is no necessity for an appellant to go further than that.

17. There is a balance to be struck between enabling an appellant who has a legitimate purpose in cross-examining a witness to do so and avoiding the disproportionate attendance of witnesses whose evidence, with hindsight, was accepted and in respect of whom there can have been no legitimate reason for requiring their attendance. It is important, in my view, that the balance should not be set so as to risk the exclusion of any valid questioning of a witness. To do so would risk an injustice. The risk on the other side, that of an appellant acting unreasonably in requiring a witness to be presented for no meaningful cross-examination, can if necessary be dealt with, proportionately, by a costs order, which can be made either as

a wasted costs order (as provided for by s 29(4) of the Tribunals, Courts and Enforcement Act 2007) or on the basis of unreasonable conduct, even in a case such as this, which is a Complex case in which CFBL has opted-out of the general costs-shifting regime. It follows that the balance must be tilted towards participation of an appellant, rather than against it.

The directions

18. With those remarks in mind, I turn to the directions that I consider should be made in this case. I shall set out the directions I have determined upon, and then summarise my reasons for adopting each particular formulation. My directions are:

> "1. By [date] the Appellant shall serve on the Respondents and file with the Tribunal a List of Issues for determination in the appeal. In particular the Appellant shall state:
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> (a) Whether the Appellant accepts that the transaction chains set out in the deal sheets produced by the Respondents in relation to the goods which are the subject of 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 what issues it wishes the Tribunal to determine in respect of all or any particularised deal sheets, and any facts on which the Appellant will seek to rely in any of those respects.
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> (b) Whether the Appellant accepts (without making any admission of knowledge or means of knowledge) that the Appellant's transactions were part of an orchestrated fraud. If not, the Appellant should set out its response to the case stated by the Respondents in that respect in paragraph 184 of the Consolidated Statement of Case; and
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> (c) 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. If not, the Appellant should specify by reference to the evidence put forward in the witness statements of those of the Respondents' witnesses whose evidence is primarily concerned with the alleged defaulters what issues it wishes the Tribunal to determine in those respects, and any facts on which the Appellant will seek to rely in those respects.
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> 2. Subject to Direction 3, all witnesses who have made witness statements shall be required to attend and give evidence under cross-examination, though their witness statements shall be taken as evidence-in-chief subject to further questions that the Tribunal may allow.
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> 3. Evidence of fact on behalf of a party contained in a witness statement shall be accepted by the Tribunal without attendance of the witness and the witness being presented for cross-examination if:

> (a) the other party has notified that party and the Tribunal that the witness is not required for cross-examination; or
>
> (b) the Tribunal has directed, pursuant to rule 15 of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009, on the application of the party wishing to rely on a witness statement, that the evidence may be given, and accepted by the Tribunal, in the form of a written statement without cross-examination."

19. Turning first to Directions 2 and 3, Mr Carey, for HMRC, advocated, in reliance upon what the Upper Tribunal had said in *Fairford* at [49], a direction that would preclude the Appellant from cross-examining HMRC's witnesses to the extent that the Appellant's response to Direction 1 "does not identify any factual dispute". I have not adopted such a formulation, for two reasons. First, it seems to me that, by focusing on pure disputes of fact, it narrows the ways in which the evidence of witnesses might be challenged in cross-examination. As I have described earlier, it is possible that evidence might be challenged other than by reference to contrary factual evidence. The Upper Tribunal did not express itself so narrowly, referring only to the need to identify the respects in which the statements are disputed.

20. Secondly, and more fundamentally, I do not consider it appropriate to set at this stage the parameters for the admission, and acceptance, of evidence without cross-examination. It is evident in this case, where CFBL is playing a full, and pro-active, part in the proceedings, that careful thought will be given to the admissions that CFBL might make and, on the other hand, the areas on which there will be no such admission, but the evidence will be subject to challenge, or properly be tested by cross-examination. In those circumstances, it would be premature, and not consonant with the interests of justice, to make any prospective direction which might restrict CFBL's participation in these proceedings. The tilting of the balance in favour of participation dictates that the presumption should be that the evidence will be the subject of cross-examination. CFBL will be expected to advise if evidence of fact is accepted. Otherwise it will be open to HMRC to apply to the Tribunal for evidence to be given by means of written statement only, but that will be a question to be determined by the Tribunal in the light of the respective cases made by the parties and any submissions as to the value, in terms of fairness and justice to the parties and assistance to the Tribunal, in having the evidence challenged or tested by cross-examination.

21. In relation to Direction 1, I have concluded that it is appropriate for there to be directions along the lines of those referred to in *Fairford*, but with some modifications. As regards Direction 1(a), I accept that any issues concerning the deal sheets, which summarise HMRC's case as to the transactions in the relevant goods in support of HMRC's contention that CFBL's purchases were connected to the fraudulent evasion of VAT, should be identified. I do not, however, accept that the issues should be confined to the *correctness* of the deal sheets; I prefer the wider formulation under which the appellant is required to identify the issues which it wishes the tribunal to determine and any relevant facts it is in a position to put forward.

22. Moving on to Direction 1(b), I regard a direction in relation to orchestrated fraud as somewhat problematic. Although, according to the example given in *Fairford*, an appellant is not required to make any admission as to knowledge or means of knowledge, it is evident that the question of orchestrated fraud is raised as an element of HMRC's case in relation to the alleged knowledge of the appellant. In this case, for example, HMRC's statement of case sets out, at para 184, their case that there was an overall scheme to defraud the Revenue. The context of that case is then explained at paras 185-186, including the assertion that the proper inference to be drawn from the existence and operation of the overall scheme to defraud is that CFBL was a knowing participant in that scheme. Thus, whilst the *Fairford* directions deliberately refrain from requiring any admission in relation to knowledge, a key element (though not, I should add, the only element) of HMRC's case on knowledge is included.

23. For the recovery of input tax to be denied a number of conditions have to be satisfied. Those conditions, which derive from the judgment of the Court of Justice in *Kittel v Belgium; Belgium v Recolta Recycling SPRL* (Joined cases C-439/04 and C-440/04), were referred to by the Upper Tribunal in *Fairford*, at [7] where, by reference to *Blue Sphere Global Ltd v Revenue and Customs Commissioners* [2009] STC 2239, at [29], the four questions to be considered were summarised:

(1) Was there a VAT loss?

(2) If so, did this loss result from a fraudulent evasion?

(3) If there was a fraudulent evasion, was the appellant's transaction that is the subject of the appeal connected with that evasion?

(4) If such a connection was established, did the appellant know, or should it have known, that its purchases were connected with a fraudulent evasion of VAT?

There is no requirement that the fraud be part of an organised or orchestrated scheme. HMRC's case in that respect is directed towards showing, by inference, that CFBL was a knowing participant and thus knew that its purchases were connected with fraud. The question of orchestration is simply part of HMRC's pleaded case which goes to the fourth of the questions above.

24. Thus, it is HMRC's case, first, that on the basis of the facts which HMRC assert, orchestration or an overall scheme to defraud the Revenue is to be inferred, and secondly by reference to such inference, if it is drawn, and other factors put forward by HMRC, that it is a proper inference that CFBL was a knowing participant in that scheme. It is possible that an appellant will be prepared to accept that the evidence supports a conclusion, by inference, of orchestration, and to that extent, in the interests of proportionality and the narrowing of the issues in dispute, a direction seeking clarification of acceptance or denial will be helpful. But if orchestration is not accepted, an appellant may not be in a position to say more than that the inference is not one that can be made on the evidence, in other words simply putting the contrary case to that made by HMRC. If that is the position, it is difficult to see what further should properly be required from an appellant by way of directions.

25. In those circumstances, it seems to me that some care needs to be taken with a direction requiring an appellant to state whether it accepts that its transactions were part of an orchestrated fraud. An unwitting appellant might fail to appreciate the significance of such an admission in the context of its overall, and likely primary, case that it neither knew nor should have known of a connection to fraud. As the matter is simply one of inference, an appellant may simply be unable to judge what inferences might properly be drawn as to the activities of other persons. It would not, in my view, in those circumstances be in the interests of justice for such an appellant to be put on the evidential back foot in the hearing as a result of a failure to provide a positive case or reasoned challenge in that regard.

26. CFBL is not, of course, an unwitting appellant. It is therefore, in my judgment, appropriate in this case for CBFL to be required to state whether or not it accepts that its transactions were part of an orchestrated fraud. However, I do not consider it is appropriate, as HMRC proposed, for the direction to go on, if that proposition is not accepted, to require CBFL to advance reasons for its position to the extent that such a requirement could go beyond what should properly be pleaded in response to HMRC's case. That case is, as I have described, set out at para 184 of HMRC's statement of case. It goes no further than placing reliance on a number of factors to establish the existence of an overall scheme to defraud. It does not, and would not be expected to, provide reasons why orchestration should be inferred from those factors. That is properly a matter for submission at the substantive hearing. Likewise, the response should put CFBL's case on this issue, but need not provide at this stage the submissions it would intend making in support of that case. That, it seems to me, is the proportionate way in which that issue can be addressed.

27. In *Fairford*, the Upper Tribunal identified a need for reasons to be given if the appellant does not accept that there has been a fraudulent VAT default at the start of each relevant chain of transactions. That, by contrast with the question of orchestration, is one of the four questions referred to in *Blue Sphere*. The formulation put forward in this case by HMRC would require CFBL first to state whether it accepted that there had been such a fraudulent VAT default, and secondly to state whether it accepted the facts set out in the HMRC witness statements dealing with the alleged defaulters and identify any matters in dispute.

28. I have reformulated, as Direction 1(c), those proposed directions to accord with what I consider follows more closely what the Upper Tribunal had in mind. I have confined the question of acceptance to the existence or otherwise of a fraudulent VAT default, rather than extending it to all the facts in the relevant witness statements, and I have directed instead that CFBL identify the issues it wishes the tribunal to determine in this respect by reference to those statements. That, it seems to me, provides scope, if it is needed, for challenge to the evidence by way of cross-examination without being confined to particular disputes of fact, for the reasons I have described above in reviewing the role which cross-examination can play.

Directions

29. I have, accordingly, today made these directions and further directions as discussed with the parties.

Application for permission to appeal

30. 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.

ROGER BERNER
TRIBUNAL JUDGE

RELEASE DATE: 19 April 2016