[2016] UKFTT 0781 (TC)

TC05508

Appeal number: TC/2015/04381

PROCEDURE – personal liability notice – FA 2007, Sch 24, para 19 – application of Article 6 of the European Convention on Human Rights – appellant's application for a stay – whether HMRC's decision to proceed by way of civil penalty an abuse of process – inability to obtain a representation order – whether standard of proof should be the criminal standard – HMRC's application to strike out parts of appellant's grounds of appeal for abuse of process in seeking to re-litigate matters the subject of earlier appeals by the company – application to admit into evidence a prior tribunal decision

FIRST-TIER TRIBUNAL
TAX CHAMBER

LINDSAY HACKETT **Appellant**

- and -

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

TRIBUNAL: JUDGE ROGER BERNER

Sitting in public at The Royal Courts of Justice, Strand, London WC2 on 4 November 2016

Ian Bridge, instructed by CTM Tax Litigation Limited, for the Appellant

Jonathan Kinnear QC and Howard Watkinson, instructed by the General Counsel and Solicitor to HM Revenue and Customs, for the Respondents

DECISION

1. The Appellant, Mr Hackett, was the sole director of a company called Intekx Limited ("Intekx"). Between 2008 and 2013, HMRC denied Intekx repayment of input VAT of £12,833,984.49, part on the basis of a case that Intekx's transactions were connected to fraudulent evasion of VAT and that Intekx knew, or should have known, that was the case (missing trader intra-Community, or MTIC, fraud), and part on the basis of a case that Intekx had failed to provide accounting records to substantiate its claim for input tax recovery.

2. Intekx appealed to this tribunal against each of those decisions. The first such appeal, which related to Intekx's VAT period 09/06, was heard by the tribunal (Judge Gort and Ms Hunter) in June and July 2013 (see *Intekx Limited v Revenue and Customs Commissioners* [2014] UKFTT 277 (TC) (21 March 2014) (*Intekx* 2014)). The tribunal decided that Intekx knew that its deals in that period were connected with fraud, and consequently dismissed Intekx's appeal. The second appeal concerned input tax denials for the VAT periods 07/09 to 10/12, again on the basis of an allegation that Intekx knew or should have known of the connection to fraud. That appeal was withdrawn by Intekx on 29 September 2014. On the following day, 30 September 2014, Intekx withdrew its third appeal, this time against input tax denials for periods 01/13 to 07/13 on the basis of failure to provide accounting records.

3. Subsequently, on 17 March 2015, HMRC notified Intekx of a deliberate inaccuracy penalty assessment in the sum of £12,833,984.49 and at the same time sent Mr Hackett a personal liability notice under paragraph 19 of Schedule 24 to the Finance Act 2007 ("FA 2007") specifying the whole of that sum as the amount payable by Mr Hackett on the basis that the deliberate inaccuracy was attributable to him as an officer of the company. Mr Hackett has appealed the personal liability notice under Sch 24, para 15, which applies by virtue of para 19(5) as if HMRC had decided that a penalty of the amount of the specified portion is payable by Mr Hackett.

4. In their statement of case in this appeal by Mr Hackett, HMRC state that the potential lost revenue which, according to Sch 24, para 5, is the basis for the penalty assessment stems from Intekx's "knowing involvement in MTIC fraud transaction chains during the relevant VAT periods". HMRC's case points to Mr Hackett being the sole director of Intekx at the material times and as having undertaken all the relevant transactions. It is asserted that Mr Hackett's knowledge was attributable to Intekx, that alleged inaccuracies in Intekx's returns are properly attributed to Mr Hackett and that by seeking to reclaim the input tax Mr Hackett sought to profit from the relevant transactions.

Applications

5. At this case management hearing I had a number of applications before me. Those by Mr Hackett are based on what are said to be the consequences of the

application to this appeal of Article 6 of the European Convention on Human Rights ("the Convention") and Mr Hackett's right to a fair hearing.

6. There is no dispute that for the purposes of the Convention the personal liability notice amounts to a criminal penalty, and that Article 6 is engaged (see *Han & Yau and others v Customs and Excise Commissioners* [2001] STC 1188). Mr Hackett seeks to stay these proceedings on two bases, first that the decision by HMRC to proceed by way of personal liability notice under FA 2007 is an abuse of process, as it amounts to a decision to prosecute a criminal allegation of serious fraud in the tribunal and thus to deprive Mr Hackett of long-standing constitutional and statutory rights such as the right to trial by jury, the criminal standard of proof, the right to representation and the privilege against self-recrimination, and secondly on the basis that Mr Hackett has not so far been able to persuade the Legal Aid Agency to grant him a representation order. Mr Hackett also seeks a direction of the tribunal that in this appeal the standard of proof to be applied is the criminal, and not the civil, standard.

7. Those applications are opposed by HMRC. They in turn apply for the striking out of various parts of Mr Hackett's grounds of appeal, on the footing that Mr Hackett is seeking to re-litigate issues which HMRC say are determined by the decision of the tribunal in Intekx's first appeal and the withdrawal by Intekx of its other two appeals and that to permit him to do so would be an abuse of process. HMRC also apply for a direction that the tribunal's published decision in *Intekx* 2014 be admitted into evidence.

Article 6 of the Convention

8. Article 6 provides as follows:

> "(1) In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgment shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interest of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice.
>
> (2) Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law.
>
> (3) Everyone charged with a criminal offence has the following minimum rights:
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> (a) to be informed promptly, in a language which he understands and in detail, of the nature and cause of the accusation against him;
>
> (b) to have adequate time and facilities for the preparation of his defence;

> (c) to defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require;
>
> (d) to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;
>
> (e) to have the free assistance of an interpreter if he cannot understand or speak the language used in court."

Abuse of process: decision to proceed with personal liability notice

9. This tribunal is a statutory tribunal, and its jurisdiction is governed by statute. It is beyond doubt, therefore, that it has jurisdiction in an appeal from a personal liability notice (FA 2007, Sch 24, paras 15 and 19(5)). That is so, irrespective of the nature of the proceedings and the application of Article 6. There was no suggestion by the Court of Appeal in *Han and Yau* that the application of Article 6 to a penalty (in that case for VAT evasion: conduct involving dishonesty under s 60 of the Value Added Tax Act 1994 ("VATA")) that was substantial, punitive and a deterrent had the consequence that the jurisdiction of the VAT and Duties Tribunal had been ousted.

10. The jurisdiction of the tribunal does not extend to judicial review of the decisions of HMRC to proceed by way of civil penalty. That HMRC have a choice in this regard has been clear since the debate on the establishment of a system of civil sanctions in VAT cases of fraud or negligent acts or omissions in the 1983 Keith Report, following which s 60 VATA was enacted. As Potter LJ noted in *Han and Yau*, at [45], the Keith Report stated (at p 411, para 18.4.50), in relation to the choice between civil penalties or criminal proceedings:

> "In our view the relative use of civil or criminal investigation techniques is a matter for Customs and Excise to regulate, weighing the competing calls on their resources, the nature of the frauds suspected and the extent to which criminal or civil investigation techniques are capable of turning up sufficient admissible evidence to satisfy the respective burdens of proof for criminal or civil proceedings. Whether investigators should switch from the civil to the criminal mode, or vice versa, in the course of an investigation, as may happen now in direct tax investigations, seems to us also essentially a matter for the Department, in the light of experience and the views and thoughts of Tribunals as to fairness to the accused in the circumstances of a particular case."

11. Once that choice is made, the question of jurisdiction for any prosecution, on the one hand, or appeal against any assessment or notice, is established. It is beyond doubt that, in making such a choice between pursuing a criminal prosecution (the prosecuting authority for which would now be the Crown Prosecution Service), HMRC must act lawfully, and that the exercise by HMRC of their discretion in this matter would be susceptible to judicial review. But the tribunal does not have any judicial review jurisdiction.

12. Nor would it be proper for the tribunal to exercise its case management powers to stay proceedings on the basis that HMRC's decision to proceed with a civil penalty was unreasonable. That would be tantamount to the assumption of a power of judicial review. I do not accept that, by assessing Intekx to a penalty for deliberate inaccuracy, or by issuing a personal liability notice to Mr Hackett, thereby resulting in an appeal being within this tribunal's jurisdiction, there has been any misuse of the tribunal's procedure, or that it will result in any manifest unfairness to Mr Hackett so as to amount to an abuse of process, or bring the administration of justice into disrepute (see *Hunter v Chief Constable of the West Midlands Police* [1982] AC 529, per Lord Diplock at p 536C). It cannot be misuse of the tribunal's procedure to issue an assessment or notice merely on account of the fact that that the assessment or notice will give rise to an appeal to the tribunal, and not to proceedings in the criminal courts.

Representation

13. Article 6 of the Convention applies to these proceedings. Mr Hackett is entitled to a fair hearing. He is entitled to the minimum rights provided for by Article 6(3). That includes the right to defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require.

14. Mr Hancock is represented in these proceedings by specialist advisers, and Mr Bridge appeared for him on these applications. He has, however, been refused a representation order. The position of the Legal Aid Agency is that Mr Hackett is not eligible for criminal funding as there is no risk of him losing his liberty. The possibility of Exceptional Case Funding has been raised, but at the date of the hearing there was no indication that Mr Hackett had made any application in that regard.

15. These circumstances are not such as to give me any cause for concern that Mr Hackett could not receive a fair hearing before this tribunal. He appears to be able to be represented, and does not appear to have exhausted all the avenues he might explore to obtain free representation. I heard no argument as to why it might be said that it would be against the interests of justice for Mr Hackett's appeal to proceed in this tribunal if he were unrepresented. The tribunal is a specialist tribunal and is well-equipped to deal with cases, including penalty cases, fairly and justly where an appellant has no legal or other representation, and is self-represented.

16. I am conscious that this is a substantial case, and that there will at all events be considerable documentary and other evidence. It is a case where it will be preferable from the point of view of Mr Hackett if he is able to have the assistance of experienced legal representation. But if that turns out not to be possible to achieve, the absence of it will not be such that Mr Hackett will not receive a fair hearing. The interests of justice will be met by there being a hearing, at which Mr Hackett will have the opportunity to challenge the case made by HMRC and to provide his own evidence and submissions in that regard. The tribunal will ensure that he is able to do so. A stay would not be in the interests of justice.

Standard of proof

17. Mr Bridge submitted that, given the serious nature of the allegation made concerning Mr Hackett, namely that he, as the sole director and manager of Intekx, had been knowingly involved in fraud, the standard of proof according to which HMRC – on whom it was accepted that the burden of proof would lie – would have to prove their case should not be the civil standard of the balance of probabilities, but the criminal standard of beyond reasonable doubt.

18. In support of this submission, Mr Bridge referred to three authorities. In the first, *B v Avon and Somerset Constabulary* [2001] 1 WLR 340, the proceedings in question were in the magistrates' court, for a sex offender order under s 2 of the Crime and Disorder Act 1998. It was held, in the Divisional Court, that the proceedings were civil proceedings, and not criminal, because the nature of the issue concerned the prevention of further criminal behaviour by injunctive means, and not the trial, conviction and punishment of an offender. The severity of the consequences for a defendant of the making of an order did not mean, as a matter of domestic law, that the proceedings were criminal.

19. On the question of the standard of proof, a distinction was drawn between two conditions for the granting of the order. The first was the condition that the relevant person be a "sex offender". In assessing that condition, Lord Bingham, with whom Astill J agreed, said (at [31]) that "a magistrates' court should apply a civil standard of proof which will for all practical purposes be indistinguishable from the criminal standard". In assessing the further condition, that there was reasonable cause to believe that an order was necessary to protect the public from serious harm, Lord Bingham said that the magistrates' court should "apply the civil standard with the strictness appropriate to the seriousness of the matters to be proved and the implications of proving them".

20. The second case concerned football banning orders, again within the jurisdiction of the magistrates' court. It was held in *Gough v Chief Constable of Derbyshire Constabulary* [2002] QB 1213 that the proceedings were civil in character and that there had been no violation of the Article 6 requirements of procedural fairness appropriate to a criminal charge. However, having regard to the serious restraints on a citizen's freedom imposed by such orders, magistrates' courts should apply an exacting standard of proof practically indistinguishable from the criminal standard when considering whether the persons concerned had caused or contributed to violence or disorder, and whether an order would help to prevent such violence and disorder.

21. Finally, the third case was *R (McCann and others) v Crown Court at Manchester and another* [2003] 1 AC 787, concerning anti-social behaviour orders (ASBOs). The proceedings were held to be civil proceedings both for the purpose of domestic law and under the Convention, but notably because they did not involve the imposition of an immediate penalty on the defendant. Nonetheless, given the seriousness of the matter involved, and the seriousness of the consequences and the stigma attached to an ASBO, it was held that the court should be satisfied to the

criminal standard of proof as to whether the defendant had acted in an anti-social manner before making such an order.

22. Those cases demonstrate that there can be cases, even those which are not classified as involving criminal proceedings either under domestic law or under the Convention, where either a heightened civil standard of proof, in some cases indistinguishable from the criminal standard, or the criminal standard itself, is appropriate. The stigma attached to being found to be a "sex offender", as having been involved in violence or disorder or being made subject to an ASBO, and the restraints on freedom which result from football banning orders or ASBOs, have all been found to merit such a heightened standard.

23. The position of penalty appeals in the tribunal was considered by the Upper Tribunal in *Khawaja v Revenue and Customs Commissioners* [2014] STC 150. The Tribunal (Judge Herrington and myself) reviewed the authorities, both domestic and those of the European Court of Human Rights, and found, in the context of an appeal against a penalty under s 95(1)(a) of the Taxes Management Act 1970 ("TMA"), that the standard of proof was the civil standard of the balance of probabilities. That did not contravene the presumption of innocence in Article 6(2) of the Convention, as it did not deprive the presumption of innocence of its substance.

24. The Upper Tribunal decision in *Khawaja* is binding on this tribunal. It concerned s 95(1)(a) TMA, under which the liability for a penalty for the delivery of an incorrect return could arise where a person acted fraudulently as well as negligently. There is nothing that could distinguish this case, even if the allegation is one of knowing involvement in fraud.

25. The cases referred to by Mr Bridge do not establish any general principle that can be applied to penalty cases in this tribunal. Indeed, those cases are examples of an exception to the general rule that, as Lord Hoffmann emphasised in *In re B* [2009] 1 AC 11, at [13], "the time has come to say, once and for all, that there is only one civil standard of proof and that is proof that the fact in issue more probably occurred than not". Nor is there any necessary connection between the seriousness of the allegation and inherent probability; see Lord Hoffmann in *In re B*, at [15], and Lady Hale, at [73]. Although, in applying the civil standard, inherent probabilities are something to be taken into account, where relevant, in determining where the truth lies, neither the seriousness of the allegation nor the seriousness of the consequences should make any difference to the standard of proof in determining the facts (*In re B*, per Lady Hale at [70]).

26. I conclude, therefore, that the standard of proof applicable to these proceedings is the civil standard of the balance of probabilities.

Abuse of process: the prior *Intekx* proceedings

27. Mr Hackett's grounds of appeal include that HMRC are put to strict proof of all matters necessary for the imposition of the penalty and its amount. It is stated that

any admissions by Mr Hackett or findings in related proceedings cannot be relied upon by HMRC.

28. HMRC accept that they bear the burden of proof in relation to the following matters:

(1) that Intekx's VAT returns for the relevant VAT periods were inaccurate and that such inaccuracies amounted to, or led to, a false or inflated claim to repayment of tax;

(2) that such inaccuracies were, by reference to the relevant VAT period, either deliberate or deliberate and concealed;

(3) that those either deliberate or deliberate and concealed inaccuracies were attributable to Mr Hackett as an officer of Intekx; and

(4) that the penalty amounts as attributable to Mr Hackett are correct.

29. Although accepting that the personal liability notice amounts to a criminal penalty for the purposes of the Convention, and that Article 6 is thus engaged, HMRC do not accept that Mr Hackett is thereby entitled to re-litigate the issues of:

(1) whether Intek's relevant transactions were connected with the fraudulent evasion of VAT of which Intekx at least should have known;

(2) the consequent inaccuracy of Intekx's relevant VAT returns since the input VAT claimed on them was never due, as the relevant transactions fell outwith the scope of VAT;

(3) the inaccuracy of Intekx's VAT returns where the company refused to provide any evidence of the underlying transactions; and

(4) the accuracy of the "potential lost revenue" figures on which the personal liability notice is based.

30. As an aside, although it does not matter for the purpose of these applications, I do not consider that it is accurate to say that transactions affected by MTIC fraud are "outwith the scope of VAT", still less those that are merely unsupported by relevant evidence. That argument, of course, was rejected by the Court of Justice in *Optigen Limited v Customs and Excise Commissioners* (C-354/03) [2006] STC 419 (see *Mobilx Ltd (in administration) v Revenue and Customs Commissioners* [2010] STC 1436, per Moses LJ at [30]). They are merely cases where, exceptionally, HMRC is able to deny the deduction for input tax.

31. On this basis, however, HMRC apply now to strike out those parts of Mr Hackett's grounds of appeal in which he seeks to re-litigate the issues of (i) whether Intekx's VAT returns for the relevant period were in fact inaccurate, (ii) whether those inaccuracies amounted to, or led to, a false or inflated claim to repayment of tax, (iii) the quantum of those inaccuracies (being the potential lost revenue figures upon which the penalty and liability notice calculations are based) and (iv) any issues of fact set out in HMRC's decision letters and statements of case for the previously litigated Intekx appeals concerning the same VAT periods. It is submitted that the

grounds of appeal in question are an abuse of the tribunal's process and therefore have no prospect of success.

32. In the course of the hearing, and before considering the abuse of process question, I expressed my doubts as to the appropriateness of HMRC's application to seek to preclude dispute on such a broad range of facts as (iv) of their application purported to cover. The inclusion of factual assertions in decision letters or a statement of case could not be regarded as sufficient to enable those facts to be taken as determined. I took the view that the application would more properly be confined to issues that HMRC considered had been settled by the earlier litigation and in respect of which they submitted it would be an abuse of process to re-litigate. On instruction, Mr Kinnear confirmed that the application would be confined to the issues set out in the application, and there would be no wider application to include the facts as set out in (iv).

33. The principle of abuse of process is based on the underlying public interest that there should be finality in litigation, and efficiency and economy in the conduct of litigation. The bringing of a claim or the raising of a defence in later proceedings may, without more, amount to an abuse of process if the court is satisfied (the onus being on the party alleging abuse) that the claim or defence should have been raised in earlier proceedings if it was to be raised at all. That principle was explained by Lord Bingham in *Johnson v Gore Wood & Co (a firm)* [2002] 2 AC 1, at p 31, where he went on to say:

> "It is, however, wrong to hold that because a matter could have been raised in earlier 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."

34. Mr Kinnear urged me to follow another case in the tribunal, *Foneshops Ltd v Revenue and Customs Commissioners* [2015] UKFTT 0410 (TC), where the question

concerned whether arguments could be raised in a penalty appeal by the company in circumstances where an earlier appeal by the company against refusal to allow deduction of input VAT on MTIC grounds had been struck out by the tribunal and not reinstated. The tribunal (Judge Mosedale) found that it would be an abuse of process to permit the company to argue in the penalty appeal that there was no connection to fraud or that the company had no knowledge or means of knowledge of the fraud.

35. In *Foneshops*, the tribunal referred in particular to *Littlewoods Retail Limited and others v Revenue and Customs Commissioners* [2014] EWHC 868 (Ch) and *SCF Finance Co Ltd v Masri* [1987] 1 QB 1028. In that latter case, it was held that a defendant who decided not to proceed with an application to discharge a *Mareva* injunction affecting certain monies standing to her credit in bank accounts on the basis that those monies belonged to her husband was prevented by issue estoppel from having the ownership question determined in subsequent garnishee proceedings.

36. In giving the judgment of the Court of Appeal, Ralph Gibson LJ referred, at p 1049, to *Khan v Golechha International Limited* [1980] 1 WLR 1482, and to the principle that "a litigant who has an opportunity of proving a fact in support of his claim or defence and has chosen not to rely on it is not permitted to put it before another tribunal". He continued:

> "In *Yat Tung Investment Co. Ltd. v. Dao Heng Bank Ltd*.[1975] A.C. 581 , the Privy Council upheld the application by the Supreme Court of Hong Kong of the doctrine of res judicata in the wider sense, namely, that it would be an abuse of the process of the court to raise in subsequent proceedings matters which could and should have been litigated in earlier proceedings. Lord Kilbrandon, giving the judgment of their Lordships, gave warning, at p. 590: 'The shutting out of a 'subject of litigation' [was] a power which no court should exercise but after a scrupulous examination of all the circumstances...' He continued that the exercise of such a power
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> 'is limited to cases where reasonable diligence would have caused a matter to be earlier raised; moreover, although negligence, inadvertence or even accident will not suffice to excuse, nevertheless 'special circumstances' are reserved in case justice should be found to require the non-application of the rule.'"

37. The tribunal in *Foneshops* found, at [31], that abuse of process does prevent previously litigated issues being re-tried between the same parties in tax cases unless there are special circumstances.

38. With respect to the judge in *Foneshops*, I do not consider that to be a correct description of the relevant principle. The judge does not appear to have had *Johnson v Gore Wood & Co* cited to her, but it is clear from the speech of Lord Bingham in that case that one does not start with the premise that the fact that issues could have been litigated in earlier proceedings means that to litigate them in the proceedings in question is an abuse of process, and only excluded from that conclusion if there are special circumstances. What is required is a broad, merits-based judgment, taking account of all the facts and circumstances. The proper approach is to ask whether in

all the circumstances a party's conduct is an abuse. Although that will often give the same result as asking whether the conduct is an abuse and then, if it is, asking whether the abuse is excused or justified by special circumstances, it will not invariably do so, and it is always necessary for the question of abuse to be considered by reference to all the circumstances of the individual case.

39. *Foneshops* was a case on different facts, as the penalty appeal in that case was made by the same party that had been the appellant in the prior MTIC proceedings. By contrast, in this case, the penalty appeal is by Mr Hackett, as the recipient of a personal liability notice attributing to him the whole of the penalty assessed on Intekx by reference to the refusals to allow deduction of input tax which were the subject of Intekx's earlier appeals to the tribunal.

40. That does not prevent the principle of abuse of process from applying. That is clear from *Johnson v Gore Wood* where, at p 31, Lord Bingham rejected a formulaic approach to application of the rule. It was enough in that case that the company, which had earlier commenced proceedings against a firm of solicitors for negligence, and which claim had been settled, was the corporate embodiment of Mr Johnson, who sought to make a similar claim. The correct approach was that formulated by Sir Robert Megarry V-C in *Gleeson v J Wippell & Co Ltd* [1977] 1 WLR 510, at p 515, namely that "there must be a sufficient degree of identification between the two to make it just to hold that the decision to which one was a party should be binding in proceedings to which the other is a party".

41. There can be no doubt in this case that Mr Hackett has that sufficient degree of identification with Intekx to enable the principle to be applied in this case. Indeed, there was no serious argument to the contrary. Mr Hackett was the sole director of Intekx at the material time, and it was he who made decisions and gave instructions on its behalf.

42. The question therefore is whether, in all the circumstances, it would be an abuse of process for Mr Hackett to argue in his own appeal against the personal liability notice, and as part of that against the penalty assessed on the company, matters which either were the subject of determination by the tribunal (in respect of the 09/06 period) or in relation to other periods could have been determined by the tribunal had the appeals in those respects not been withdrawn.

43. So far as the 09/06 period is concerned, the relevant issues were the subject of a final determination by the tribunal in *Intekx* 2014, having considered on a hearing of the substantive appeal all the facts and evidence including the evidence of Mr Hackett. I have no doubt in that respect that it would be an abuse of process for Mr Hackett to seek to re-litigate the relevant issues determined by the tribunal in that appeal. Mr Hackett, in his capacity as director of Intekx, has had an opportunity to put forward his case that in that period there was no connection between the transactions of Intekx in that period and fraudulent evasion of VAT, and that Intekx did not know of any such connection. It would be contrary to the principle of finality of litigation to allow that determination to be re-visited on this appeal. It would be a

clear abuse of process to do so, and there are no circumstances that could justify such a course.

44. The circumstances for the other periods are different. In those cases there has not been any determination by the tribunal, whether on a substantive hearing or otherwise. There has been a withdrawal of those appeals. Those withdrawals were stated to be, at least in part, due to the difficult financial position of Intekx as a result of the actions of HMRC (from which it can be inferred that this was a reference to the denials of repayments of input VAT). That is not a decisive factor, but nor is it irrelevant, as Lord Bingham explained in *Johnson v Gore Wood & Co*, in the passage referred to earlier. Although there is sufficient identification between Mr Hackett and Intekx not to preclude the application of the abuse of process principle, the fact that the present appeal is made by Mr Hackett and not by Intekx is also a relevant factor. It is also relevant that, at the time when the earlier appeals were withdrawn, Mr Hackett was unaware that he might be exposed to a personal liability notice in respect of a penalty assessment not then made upon Intekx.

45. As Lord Millett explained in *Johnson v Gore Wood*, at p 59, the abuse of process principle is no more than a procedural rule based on the need to protect the process of the court from abuse and the defendant from oppression. In the case of the prior appeals of Intekx for which on account of the withdrawal of those appeals there has been no determination of the facts and issues by the tribunal, it would in my judgment not be an abuse of the processes of the tribunal for those facts and issues to fall to be determined by the tribunal on this appeal by Mr Hackett. I would go further. To fix Mr Hackett with deemed findings in respect of those appeals, in the circumstances where he is appealing against a personal liability which has arisen only after those appeals were withdrawn would in my judgment be contrary to the interests of justice. Nor do I consider that requiring HMRC, on whom the burden of proof is accepted to fall in this appeal, to prove relevant facts which have so far not been substantively determined could be regarded in any sense as oppressive.

46. It follows therefore from this that:

(1) It would be an abuse of process for Mr Hackett to dispute in the present appeal facts and issues determined by the tribunal in *Intekx Limited v Revenue and Customs Commissioners* [2014] UKFTT 277 (TC). His grounds of appeal must therefore be read subject to that caveat.

(2) Otherwise, I conclude that it would not be an abuse of process for Mr Hackett to dispute in the present appeal facts and issues in the appeals of Intekx in relation to VAT periods 07/09 to 07/13 inclusive.

(3) Subject to (1), I refuse HMRC's application to strike out any part of Mr Hackett's grounds of appeal.

Admissibility of the tribunal's decision in *Intekx* 2014

47. It follows from my conclusion that there can be no dispute as to the facts and issues determined by the tribunal in *Intekx* 2014 that, in relation to period 09/06, the decision of the tribunal in that appeal is admissible.

48. The question is whether that admissibility should also extend to the periods 07/09 to 07/13. In my judgment there is no reason to exclude that evidence. The general principle, as stated by Lightman J in *Mobile Export 365 Limited v Revenue and Customs Commissioners* [2007] STC 1794, at [20], is that there is a presumption that all relevant evidence should be admitted unless there is a compelling reason to the contrary. HMRC seek to rely on the findings of the tribunal in *Intekx* 2014 to support their case that, in similar circumstances, there has been a deliberate inaccuracy for which a penalty was payable by Intekx and that the deliberate inaccuracy was attributable to Mr Hackett.

49. I am satisfied that the decision of the tribunal in *Intekx* 2014 is relevant. This is a case where, although questions of input tax recovery are necessarily viewed by reference to individual accounting periods, transactions must be examined not in isolation but having regard to their attendant circumstances and context, the relevance of "similar fact" evidence and the fact that the tribunal, in examining the state of knowledge of the company and Mr Hackett, is entitled to look at the totality of the deals effected by Intekx, and their characteristics (see the judgment of Christopher Clark J in *Red 12 Trading Ltd v Revenue and Customs Commissioners* [2010] STC 589, at [109] – [111]). It will be for the tribunal that hears Mr Hackett's appeal to determine what weight, if any, is to be accorded to the *Intekx* 2014 decision outside the confines of its own facts and circumstances. It cannot, however, in the circumstances of this appeal, be regarded as irrelevant, nor have I been able to identify any compelling reason why the decision should not be admitted.

50. Accordingly, I direct that the decision of the tribunal in *Intekx* 2014 be admitted into evidence in this appeal for all purposes.

Directions

51. I have made consequential case management directions for release to the parties with this decision.

Application for permission to appeal

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
UPPER TRIBUNAL JUDGE

RELEASE DATE: 23 NOVEMBER 2016