TC02745

Appeal number: LON/2007/1103 & TC/2010/3995

PROCEDURE – whether two appeals to be consolidated – whether evidence from "invoice" appeal to be admitted into "Kittel" appeal – whether procedural prejudice to appellant – no – applications allowed

FIRST-TIER TRIBUNAL
TAX CHAMBER

FIRST CLASS COMMUNICATIONS LIMITED **Appellant**

- and -

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

TRIBUNAL: JUDGE BARBARA MOSEDALE

Sitting in public at Bedford Square, London on 26 April 2013

Mr I Bridge, Counsel, instructed by Field Fisher Waterhouse LLP, for the Appellant

Mr J Kinnear QC, instructed by the General Counsel and Solicitor to HM Revenue and Customs, for the Respondents

DECISION

1. The appellant has two appeals lodged with this Tribunal. The first in time is LON/2007/1103 which is an appeal against HMRC's refusal dated 8 June 2007 to repay input tax of £369,136.25 shown on three invoices issued by a company called Future Communications Ltd to the appellant in the VAT period 03/06. The grounds of HMRC's refusal are (in summary) that the invoices were for the purchase of Samsung Serene mobile telephones and the goods were not correctly stated in the invoice contrary to Regulation 14(1)(g) because, alleges HMRC, the mobile phones which were the subject of the invoices did not exist. I will refer to this as the 'invoice appeal' to distinguish it from the second appeal.

2. That second and later appeal (TC/2010/3995) is against a decision of HMRC refusing to repay input tax of £332,056.11 incurred in 56 transactions in the period 06/06 to 09/06 on the grounds that these transactions were connected with the fraudulent evasion of VAT (specifically MTIC fraud) and that the appellant knew or ought to have known this. I will refer to this as the 'Kittel appeal' although this is merely shorthand and does not prejudge the issue of whether HMRC can make out a connection to MTIC fraud in that appeal.

3. It is relevant to note that Future Communications Ltd, the supplier of the 3 deals at issue in the invoice appeal, was the supplier to the appellant in 5 out of 56 of the deals at issue in the Kittel appeal.

4. On 13 February 2013, HMRC made an application for three directions:

(a) for the two appeals to be consolidated;

(b) or, in the alternative, for evidence served in the LON/2007/1103 invoice appeal to be served in the TC/2010/3995 Kittel appeal;

(c) and in any event, for leave to serve further evidence in the invoice appeal.

The third application

5. The third of these applications is by far the easiest to deal with as it is unopposed. HMRC wish to serve an updating witness statement dated 13 February 2013 by an HMRC officer, Mrs Judith Clifford, in the invoice appeal. This application is allowed by consent.

6. Another matter, which arose during the course of the hearing, was a direction requested by Mr Bridge and not opposed by Mr Kinnear, and so for the record, I make it here in both appeals:

7. It is directed that a failure at the hearing by either party to cross examine the other party's witnesses of fact as to an opinion given by that witness in a witness statement is not to be taken as acceptance by that party of that opinion.

8. This direction is made to save time, and in particular to avoid it being seen as necessary to challenge opinions given by witnesses of fact, although the direction might be technically superfluous as a Tribunal should not rely on opinions stated by witnesses of fact in forming its own conclusions.

The first two applications

9. Both HMRC's first and second applications are opposed: the parties did not even agree on the order in which I should consider them. HMRC thought I should consider consolidation first and only if that was refused to consider whether evidence from one appeal should be admitted in the other.

10. I agree with Mr Bridge that I should first consider whether the evidence from the invoice appeal should be admitted in the Kittel appeal: unless I know whether the evidence from the invoice appeal would be relevant to and admitted in the Kittel appeal, I could not take an informed decision on whether it would be right to consolidate the appeals.

The second application - evidence sought to be admitted into Kittel appeal

11. HMRC wishes to admit 7 new statements into the Kittel appeal. All bar one of these date to 2008 or 2009 and these statements with their exhibits have long been admitted into evidence in the invoice appeal. Therefore they do not amount to new evidence to the appellant or its advisers. They have had possession of these statements for some 4 to 5 years.

12. One of the statements is new, but not the contents of it. This is the statement of Mrs Clifford. The statement Mrs Clifford served in the invoice appeal in 2008 was very long: the new one is merely a cut down version of it. I was told this was because HMRC considered that, in the light of developments since the original statement was given and in particular the convictions of various persons associated with the supplier, Future Communications Ltd, it was no longer necessary for Mrs Clifford's evidence to be so detailed. HMRC would be relying on the convictions as evidence of fraud committed by those persons.

13. The evidence is not particularly voluminous at least in the context of an appeal in which connection to & knowledge of MTIC fraud is alleged: the statements and some 61 exhibits amount to one lever arch file.

Is the evidence relevant to the Kittel appeal?

14. HMRC submits the collective effect of those 7 witness statements potentially is a conclusion that the tribunal hearing the Kittel appeal might reach that the appellant or the appellant's officers are not credible, that they knew that those transactions in 03/06 involved goods that did not exist, and that that is relevant to the appellant's state of knowledge on the deals in periods 06/06-09/06.

15. It is Mr El Homsi's (chief witness for the appellant) case that the phones existed and (according to his witness statement) that they were not counterfeit and that he saw at least some of them and that they were inspected (paragraphs 47, 49, 58, 59, 63, 72). Mr Wald's (HMRC officer) evidence challenges matters such as the quality of the appellant's due diligence.

16. The appellant's case is that the evidence is not relevant: it relates to a different time and different transactions. It also says HMRC is being selective in seeking to draw comparisons between trading in March 06 and trading in June-September 06. They are, says Mr Bridge, seeking to blacken the appellant by selectively picking on a notorious criminal case merely because the appellant had just happened to have traded with a company the owners of which were later convicted of fraud.

17. I agree with HMRC that it would certainly affect the credibility of the appellant's witnesses if it was shown that they had knowingly caused the appellant to trade in goods which did not exist or which they should have known did not exist: if the tribunal reached that conclusion on the evidence it heard, it might well consider it relevant to questions of what the appellant knew or ought to have known in respect of the transactions, some of which were with the same supplier, which took place only three to six months later. And it has always been open to the appellant to give evidence of its trading practices outside the periods 06/06-09/06 if it considers that that helps its case with respect to what happened in that period.

18. I am satisfied that *if* it is part of HMRC's case in the Kittel appeal that the appellant had, three months before the transactions in issue, and with one of the suppliers who supplied them in the disputed transactions, traded in goods which it knew did not exist or which it should have known did not exist then (a) the allegation would be relevant to HMRC's case in the Kittel appeal and (b) that the evidence now sought to be introduced would be relevant to that allegation and therefore to the Kittel appeal.

New allegation

19. However, I find that this is an entirely new allegation by HMRC. It is agreed, and indeed obvious from the statement of case, that HMRC do not state as part of their case in the *invoice* appeal that the appellant knew or ought to have known that the Samsung Serene phones did not exist; nor do they seek to add such an allegation now.

20. In the Kittel appeal, it is part of HMRC's case that the appellant knew or ought to have known that 56 of its deals were connected to MTIC fraud. So far it has not been part of HMRC's stated case that the fraud to which it alleges the appellant's transactions to be connected is evidenced because one of the suppliers (Future Communications Ltd) was also the supplier of the three deals at issue in the invoice appeal in which (it is HMRC's case) that the goods did not exist; nor is it currently part of their case that the appellant's knowledge or means of knowledge of the alleged fraud is evidenced because the appellant had three months earlier traded in goods which it knew did not exist or which it ought to have known did not exist.

21. HMRC have not sought to amend their statement of case in either appeal. As I understand it, nevertheless, they do wish to make this new allegation in the Kittel appeal, which is that the appellants knew or ought to have known in 03/06 that they were trading in goods which did not exist. It seems to me however, the evidence could not be admitted unless HMRC made clear to the appellant what the new allegation is: without an allegation in the Kittel appeal that (a) the goods did not exist and (b) the appellant knew or ought to have known the goods did not exist, the evidence has no relevance.

22. While technically I consider HMRC ought to have coupled their application to admit the new evidence with an application to amend their statement of case, to dismiss the application on this technicality is likely to simply result in later re-hearing of this application coupled with an application now to amend the statement of case. As I can conveniently deal with it now, it saves everyone's time and any further delay in the appeal's progress and I will do so, particularly as I note that in any event the appellant has been on notice that HMRC wishes to make this new allegation since receipt of the application to admit new evidence, as it is stated at paragraph 31:

> "If the tribunal found that the Appellant knowingly dealt in non-existence goods in 03/06 that is a finding that affects the bona fides of the entirety of its trade. To not be able to adduce such evidence would be prejudicial to the Respondents."

So I will treat that application as an application to both make the new allegation in the Kittel appeal that the appellant knowingly traded in non-existance goods in 03/06 and to admit the evidence which HMRC claims supports the allegation.

23. So I consider the main objection to it which is the lateness with which the application is made.

Effect of delay – procedural prejudice

24. No reason was given why HMRC had not made this application earlier: the evidence is far from new. The invoice appeal is even older than the Kittel appeal and the HMRC solicitor dealing with the Kittel appeal should have been aware of the invoice appeal. For whatever reason, while it seems obvious to me that the evidence from one might be relevant to the other, HMRC did not make this application until 2½ years after filing their statement of case in the Kittel appeal and after the evidence had closed.

25. HMRC's case is that their delay is not by itself relevant. What is relevant, say HMRC, is whether the delay will cause the appellant procedural unfairness. HMRC's case is that it does not.

26. The appellant's position is that, at the very least, admitting new evidence now will delay the hearing, which, were it not for that, would be ready to be listed.

27. However, I cannot agree with the appellant on this. What I should do is compare the current position with the position which would have existed if HMRC

had made the application at the proper time (ie included the allegation in the Statement of Case). This is because I am considering the effect of HMRC's *delay* on the appellant so I should compare the current position with the position if there had been no delay. I am not comparing the current position with the position of no such application ever being made.

28. If HMRC had made its application promptly, then this evidence would have been exchanged at the same time with the other evidence (as it already existed). But the case would, it seems, still not be ready for listing today. This is because Mr Bridge indicated that in the *invoice* appeal the appellant is considering filing an application for disclosure against HMRC in relation to IMEI numbers of Samsung Serene telephones with a view to showing that more of these phones were in existence than claimed by HMRC. But, it seems to me that if HMRC had made the allegation and filed the evidence at the proper time in the Kittel appeal, this disclosure application would be as relevant to the Kittel appeal as to the invoice appeal.

29. So it seems that, if HMRC had made its application promptly, the Kittel appeal would still not be ready to list as the appellant is considering making a disclosure application that would be relevant to both appeals. (No doubt HMRC will say that the appellant should have made this application in the invoice appeal more promptly, although, in the circumstances of their own delay in making this application, such an objection might sound hypocritical.)

30. Even without this consideration, I do not think that there is much if any *procedural* prejudice to the appellant. The "new" evidence is well known to them. It does not take them by surprise. They have already responded to it and HMRC have no objection to their witness statements in response being admitted into the Kittel appeal.

31. The allegation, on the other hand, is new: it has formed no part of the invoice appeal. But there is no suggestion that the appellant needs or wants more time to address it (other than to seek the disclosure already mentioned on IMEI numbers which they could have sought any time since 2007). Admitting it would not mean that the hearing had to be delayed: it is not yet listed and all that would need to be done is to confirm time estimates and dates to avoid on the basis that the time estimates would need to be revised upwards to take account of the time needed to hear the new evidence. Were it not for the appellant's intention to apply for further disclosure, the relevance of which I have already dealt with, the only very minor delay to the hearing occasioned by admitting this new evidence and allegation would be the need to obtain the revised time estimate and dates to avoid.

Effect of delay per se

32. Putting aside the question of procedural prejudice, the appellant considers that the delay in making the application is by itself sufficient for the evidence (and, it follows, the allegation) to be excluded.

33. I consider the case law on this.

34. The oft-cited decision of Mr Justice Lightman in *Mobile Export 365 Ltd & anor* [2007] EWHC 1737 (Ch) was that

> "[20]….the presumption must be that all relevant evidence should be admitted unless there is a compelling reason to the contrary."

35. HMRC do not consider their failures in the conduct of this case and in particular the failure to make the application earlier is a compelling reason to refuse to admit the evidence, because, as I have said, there is little if any procedural prejudice to the appellant.

36. But good case management would suggest that parties should be encouraged to do things in a timely fashion. However, HMRC drew my attention to the decision of Mr Justice Peter Smith in *Nottinghamshire and City of Nottingham Fire Authority & Anor v Nottingham CC* [2011] EWHC 1918 (Ch) where he was very robust in stating that the purpose of the court is not to punish parties for errors of judgment in how they conduct a case: parties ought to be able to correct errors as long as doing so does not cause procedural prejudice to the other side which cannot be compensated for in costs.

> "[14] It ought to have been obvious to those representing NCC from an early start of the cross examination in the trial that Mr Jones' evidence was going to be vital…In my view that ought to have been blindingly obvious before the trial…..
>
> [16] …Rightly or wrongly lawyers involved in litigation sometimes miss or fail to spot the significance of particular issues and this only becomes alive either shortly before the trial or during the trial….

The judge then went on to weigh the potential importance of the new evidence to the defendant against the procedural prejudice to the appellants. He admitted the evidence, even though the trial had already begun, saying:

> "…I firmly believe that … a decision to exclude evidence should not be made *merely because it is late.* If during the trial late evidence emerges which is important it is essential that the evidence is heard provided that evidence will not cause fatal prejudice to the other party. There will be cases when late evidence cannot be properly dealt with by the other side. In such circumstances it is almost inevitable that the application to addue the evidence will be refused. On the other hand where the late evidence can be dealt with by the other party even on terms as to adjournment in costs the evidence should ordinarily be allowed."

37. His decision looked at two decisions of the Court of Appeal which he considered inconsistent with each other. In *Cobbold (1990)(unrep)* Lord Justice Peter Gibson said:

> – "it is…important that trial dates, when they are fixed should be adhered to, but I fear that [the trial judge] may have let that factor dictate his approach to the question of amendment. The overriding objective is that the court should deal with cases justly. That includes,

> so far as practicable, ensuring that each case is dealt with not only expeditiously but also fairly. Amendments [to particulars of claim] in general ought to be allowed so that the real dispute between the parties can be adjudicated upon provided that any prejudice to the other party …caused by the amendment can be compensated for in costs, and the public interest in the efficient administration of justice is not significantly harmed…..There is always prejudiced when a party is not allowed to put forward his real case, provided that that is properly arguable."

38. In the later *Mills & Reeve* case [2011] EWCA Civ 14 Lloyd LJ said, overturning Mr Justice Peter Smith's decision at first instance to allow an amendment to pleadings:

> "I do accept that the court is and should be less ready to allow a very late amendment than it used to be in former times, and that a heavy onus lies on a party seeking to make a very late amendment to justify it…"

39. Mr Justice Peter Smith in the *NCC* case (perhaps not surprisingly) preferred the earlier decision in *Cobbold.*

40. I also take into account the recent decision of the Upper Tribunal in *Atlantic Electronics Ltd* [2012] UKUT 423 (TCC) although this was not cited to me:

> "[16] …. This was evidence HMRC wished to put in after the expiry of the time limit imposed by tribunal directions, already extended several times, and when they knew that an application for permission would be necessary. A litigant wishing to put in late evidence has a duty to make the application promptly and, in a case such as this where the evidence is being compiled, to forewarn his opponent: it is not a case in which doing so would undermine the purpose of the evidence. HMRC did not forewarn, and took an unexplained amount of time to produce the evidence.
>
> [17.] The information available to me about the relative prejudice to the parties of admitting or excluding the evidence was rather limited, but I was satisfied that my admitting Mr Johnson's evidence would cause more than trivial prejudice to the Company. The combination of that prejudice and HMRC's failure to act openly, in my judgment, outweighed the fact that the evidence is relevant and the prejudice to HMRC of excluding it. For that reason I decided that the overriding objective dictated the exclusion of this evidence."

41. Here Upper Tribunal Judge Bishopp took into account the applicant's delay (without good cause) in making the application as a factor, which combined with actual prejudice, led to the exclusion of the evidence. The distinction is that it appears in that case that HMRC knew they were preparing evidence which they would apply to admit late but did not warn the other party. In this case there is no suggestion that this application is made late through anything other than oversight. The appellant was told by HMRC at a recent hearing that this application would be made, in much the same way as they have forewarned HMRC they will be making an application for disclosure.

42. My conclusion is that delay in making the application is not by itself sufficient to exclude evidence or a new allegation. While I consider that the Tribunal has an interest in good case management and encouraging parties to proactively pursue their cases and make relevant applications promptly, the tribunal has no interest in simply punishing a party for failing to act in this manner. This does not mean that there is no incentive on a party to act promptly. While the Tribunal should not administer sanctions simply for a failure to act promptly, it must and will apply sanctions (such as refusing an application) where the failure to act promptly leads to procedural prejudice to the other party.

43. In *Atlantic Electronics*, it was the delay combined with procedural prejudice which led to the exclusion of the evidence. It seems to me that this was also behind the comment of Lloyd LJ in *Mills & Reeve:* a very late amendment needs a great deal of justification as it is almost bound to lead to procedural prejudice to the other party, such as the loss of a hearing date or an inability to prepare for the new evidence properly.

44. It is, as so many things are, a question of degree. The longer the delay, the more likely there will be procedural prejudice. The greater the procedural prejudice, the less likely it will be admitted. It is also clear that the importance of the evidence to the person seeking to rely on it must be weighed in the balance. Evidence critical to one party's case is more likely to be admitted than evidence of only peripheral relevance.

45. I accept that HMRC have had three years to realise the relevance of this evidence to their case in the Kittel appeal, but they have done nothing until now: the delay is not explained or excused and it appears simply it was a failure to appreciate the potential relevance of the invoice appeal to the Kittel appeal.

46. It was not suggested to me that the evidence is critical to HMRC's case, and that without it they do not consider they can make out their allegation of knowing involvement in fraud. On the other hand, the allegation is clearly potentially significant to their case. It is of more than peripheral relevance. HMRC's case may be significantly prejudiced if it is not admitted.

47. The new evidence may be prejudicial to the appellant's case. They do not want it in. But that is not the issue. The issue is whether there is *procedural* prejudice: will the appellant be handicapped by the allegation being made now rather than when it should have been made in the Statement of Case? I have determined that I cannot see, for the reasons given above, any significant *procedural* prejudicial to the appellant for the allegation to be made, and the evidence to be admitted, now. And as I have also determined that the evidence and allegation may potentially be of real help to the Tribunal in reaching its conclusions, and that HMRC's delay by itself is not a reason to refuse to admit it, my decision on balance is to admit it.

48. My decision is therefore that it is admitted as long as HMRC formally notify the appellant within 7 days of the additional allegation they make in respect of it, and as outlined at the hearing before me and set out in paragraph 21 above. And it follows

that all evidence served by the appellant in response to the 7 witness statements in the invoice appeal now admitted (and including evidence in response to Mrs Clifford's original, long witness statement) is also admitted in evidence in the Kittel appeal.

The first application - consolidation

49. In support of their application to consolidate the appeals, HMRC drew to my attention the decision of Mr Justice Turner in the *Maharani Restaurant* (1999) STC 295. This concerned assessments for alleged under-declaration of VAT and civil evasion penalties against the partners in two partnerships, where the partners were largely the same persons in both cases, the partnerships carried out the same type of business and shared some of their suppliers.

50. The Judge viewed the appellants' appeal against the tribunal's decision to consolidate the two cases as lacking any substance and said [page 300 d]:

> "If these proceedings had been in a criminal court it is, in my judgment, inconceivable that an application for separate trials of counts in an indictment affecting one restaurant should not have been heard at the same time as counts in the same indictment affecting the other."

51. The particular reasons for the Judge's decision were (page 300a):

(a) All the relevant witnesses in one case were witnesses in the other;

(b) It would be a "mischievous result" if there were two separate hearings and the witnesses were believed in one case but not the other case;

(c) Convenient for the witnesses to attend only once to give evidence;

(d) Save on overall hearing length (two seven day hearings compared to a single ten day hearing);

(e) Tribunal ought to have the ability to ensure it only made proper use of the evidence and in particular not to make findings based on similar fact evidence where not proper to so do.

I go on to consider these factors in the cases before me.

Overlap of evidence

52. In this case there is a substantial overlap of witnesses. The HMRC witnesses in the invoice appeal are:

(1) Mr Wald, who was the officer assigned to the appellant and who gives evidence about the appellant's trading;

(2) Mr Hjannung and Mr Bishop from the manufacturer and supplier of the Samsung Serene phones who give evidence of how many such phones were in circulation in March 2006;

(3) Mr Mendes and Mr Burt, both HMRC officers, who give evidence on matters such as the weight and size of pallets;

(4) Mrs Judith Clifford who gives evidence about Future Communications Ltd who was the supplier shown on the invoices;

(5) Mr Strachan and Mr Tobais, HMRC officers who gives evidence about the freight forwarders where the alleged goods were stored;

(6) Mr Stone, a senior HMRC officer, who gives evidence about HMRC policy.

The appellant's witnesses are Mr El Homsi, who is the owner of the appellant, and an employee, a Mr Brown, who both give evidence about the appellant's trading.

53. In the Kittel appeal, there are some 35 witnesses. Most of these witnesses' evidence is not in dispute: I am told that the appellant accepts the evidence of the defaulter officers (the officers giving evidence about alleged missing traders). The persons whose evidence the appellant does not accept are:

(1) Mr Wald;

(2) Mr Fu Lam

(3) Mr Stone.

The appellant's witnesses are Mr El Homsi, Mr Brown and a Mr Hallak. All three are required for cross examination by HMRC.

54. In view of the fact I have admitted the evidence from the invoice appeal into the Kittel appeal, there is therefore a very substantial overlap in evidence. Nearly all the disputed evidence will be the same (or at least involve the same witnesses) in both appeals. The main difference will be the substantial but undisputed evidence about the defaults which will only be relevant to the Kittel appeal.

55. The overlap in evidence is so substantial that this indicates that the two appeals ought to be consolidated

Convenience of witnesses

56. Because of my decision to admit the invoice appeal evidence into the Kittel appeal, the very substantial overlap of witnesses means that it will be of convenience to most the witnesses giving oral evidence if the appeals were consolidated.

Risk of inconsistent findings

57. I consider this to be a very significant concern. It is very undesirable for two separate tribunals to be asked identical questions of fact such as whether the phones existed. I feel strongly that, because of this risk and my decision that the evidence from the invoice appeal be admitted into the Kittel appeal, the appeals should be consolidated.

Risk of complex hearing

58. Combining the two appeals will make for a more complex hearing. The burden of proof is on HMRC in the Kittel appeal but on the appellant in the invoice appeal (although the evidential burden may shift to HMRC to show, if they can, that the goods did not exist). The Tribunal will have to keep the distinctions in mind.

59. But the evidence from the invoice appeal will be relevant to the Kittel appeal so the tribunal will be able to consider the question of what the appellant knew in 03/06 when looking at what they knew in 06/06-09/06. They will not need a "Chinese wall" in their mind.

60. The appellant points out that knowledge is not pleaded in the invoice appeal: but I do not see that as a problem. The answer is, as HMRC points out, that knowledge is not pleaded as it is not directly relevant. To succeed in the invoice appeal, HMRC need only show the goods did not exist and that therefore the invoice did not comply with Regulation 14. The Tribunal will need to keep the different law on which the two denials of input tax took place firmly in mind but I see this as well within the capabilities of an expert tribunal.

61. Mr Bridge says he would need to make an application to exclude evidence of fraud from the invoice appeal on the grounds fraud was not pleaded: I do not see the need for this. Fraud is not pleaded in the invoice case and therefore could not form part of the Tribunal's decision in the 03/06 decisions: the Tribunal could not uphold the 03/06 denials on the basis they find (if they do) that knowledge was made out on the 06/06-09/06 transactions. The 03/06 denials could only be upheld if the Tribunal finds that HMRC have made out its case that the goods did not exist.

62. I make the additional point that Mr Justice Turner referred to what would happen in the criminal courts (paragraph 50 above), no doubt having in mind that in both cases in *Maharani* HMRC alleged civil evasion, which is an allegation of criminal conduct but with only civil penalties: this is quite different to these two cases. It is only in the Kittel case that an allegation tantamount to an allegation of crime (ie the allegation of entering into a transaction knowing that it was connected to fraud) is made against the appellant. But, as I have said, the tribunal should be able to keep in mind the different allegations and the different burdens of proof.

63. One further matter of complexity is that the costs regimes of the two appeals may be different as one appeal was commenced prior to April 2009 and one afterwards. The applicable costs regime in the invoice appeal is not yet resolved: there is a long outstanding application by HMRC for the "old" costs regime to apply. I understand neither party wishes to resolve this while there is an outstanding application by the appellant on the invoice appeal to appeal my decision refusing to bar HMRC from that case. The result of the costs application when it is ultimately heard and decided may be that the invoice appeal will have a different costs regime to Kittel appeal. This will add to a degree of complexity in that some of the costs incurred (eg in dealing with the 7 witnesses statements admitted by me from the invoice appeal into the Kittel appeal) will relate to both cases.

64. Apart from the fact that this indicates costs will be saved by consolidation, I consider it well within the abilities of the Tribunal or Costs Judge to deal with this added complexity on costs.

Time and costs saving

65. HMRC's estimate is that the Kittel appeal will take 10 days and the invoice appeal 6 days. They consider a consolidated hearing will take 12 to 13 days. They did not think time saving was a major consideration on the question of consolidation.

66. The appellant does not agree with HMRC's time estimate and want the Kittel appeal listed for only 5 days (with closing to follow later).

67. Whatever is the correct time estimate, it is clear that because of my decision to admit the new evidence into the Kittel appeal, there will be a significant saving in time and costs as a great deal of evidence will only have to be heard once, although I agree with HMRC that this is not the most major of considerations in this case.

Prejudice to either party

68. HMRC's case is that it is prejudicial to their cases if the appeals are not consolidated and prejudicial if the Kittel appeal is heard before the invoice appeal. As I have admitted the evidence from the invoice appeal into the Kittel appeal, there is nothing in this.

69. The appellant claims prejudice on the basis of delay: on its case, it is out of its money and has been for some considerable time. Any delay is prejudicial. Bar the outcome of this application, says Mr Bridge, the Kittle appeal is ready for hearing: although it has not been listed, dates to avoid have been provided.

70. The invoice appeal, on the other hand, is not ready for hearing. The appellant has applied for leave to appeal my decision (*First Class Communications Ltd* [2013] UKFTTT 90 (TC)) refusing to bar HMRC and indicated to me, as I have mentioned, that they are considering an application for disclosure by HMRC of IMEI numbers on the grounds this might evidence that the number of Samsung Serenes in circulation exceeded the numbers stated to be in circulation by HMRC's witnesses.

71. I am not persuaded that there is much delay here other than that occasioned by the appellant itself. No reason was given why the appellant had not already made the application for disclosure. It seems to me that it has had 6 years to apply for it and its failure to do so to date could not justify a refusal to consolidate as this would enable it to rely on its own failure to defeat an application by the other party.

72. So far as its application for permission to appeal is concerned, I have considered this and refused it for reasons given in a separate decision. I do not consider that such an appeal has a reasonable prospect of success. The appellant may chose to renew its application for permission to appeal before the Upper Tribunal. But my view is that such an application for the same reason would not have a reasonable prospect of

success. A delay occasioned to the consolidated appeal by the appellant making an application which does not have a reasonable prospect of success cannot justify refusing consolidation. Further, the appellant has the ability to request the Upper Tribunal to expedite its application on the grounds its appeal cannot be heard at first instance until the application to appeal is resolved.

73. In any event, as I have already said, because of my decision to admit the new evidence, the Kittel appeal is not ready for listing: the disclosure the appellant indicates it will seek is now as of much relevance to the Kittel appeal as the invoice appeal and will equally delay both.

Conclusion

74. Avoiding inconsistent findings on factual matters now central to both appeals because of my decision to admit the evidence, saving time and costs, and convenience to witnesses outweigh, in my view, the increase in complexity in having a joined hearing and strongly indicate that the appeals should be consolidated. I would be inclined to this view even if that resulted in the Kittel appeal being delayed until the invoice appeal were ready: but as I have explained, because of my decision to admit the new evidence, it does not appear that the Kittel appeal is ready to be listed as the appellant's proposed disclosure application will relate to both.

75. My decision is to join the appeals now, and to consolidate the appeals as soon as the appellant's application for permission to appeal my decision not to bar HMRC on the invoice appeal is resolved, on the assumption it is resolved in HMRC's favour: if the appellant is given permission to appeal and that appeal is successful, then it seems to me that only the Kittel appeal will remain live and there will be nothing to consolidate.

Would my decision on consolidation be different if I had not allowed HMRC's second application?

76. I note that I might have reached a different conclusion if I had not allowed the evidence from the invoice appeal into the Kittel appeal. While there would still be overlap of some evidence, it would be lesser both in quantity and in relevance to the appeals, relating mostly to the appellant's trading practices. There would necessarily be less saving in time in a joined hearing and less inconvenience to witnesses would be avoided. There would still be a risk of inconsistent findings, particularly if HMRC or the appellant challenge each other's main witnesses' credibility in both appeals. Whether this risk would justify consolidating the hearings I do not have to decide, as I have admitted the evidence from one in the other, and consolidation is clearly indicated.

77. 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.

BARBARA MOSEDALE
TRIBUNAL JUDGE

RELEASE DATE: 9 May 2013