TC04584

Appeal numbers: TC/2014/06344
TC/2015/03798

PROCEDURE – application to consolidate – principles to be applied – whether a congruity of relevant evidence – admissibility of similar fact evidence – whether prejudice to appellant

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 6 August 2015

Tarlochan Lall, instructed by Keystone Law, for the Appellant

Joshua Carey, of the Solicitor's Office of HMRC, for the Respondents

DECISION

1. At the conclusion of the hearing on HMRC's application for these appeals to be consolidated I announced that the application would be allowed, and the appeals would be consolidated, and I made certain directions for the case management of the consolidated appeal. I explained that I would provide full reasons in a later written decision; this is that decision.

The appeals

2. The appellant, C F Booth Limited ("CFBL"), has made two appeals to this tribunal from decisions of HMRC:

(1) The first ("the 2014 appeal"), which has the appeal reference number TC/2014/06344, is an appeal against assessments to VAT under s 73 of the Value Added Tax Act 1994 for monthly accounting periods from October 2012 (10/12) to March 2013 (03/13) on the footing that certain supplies of mixed metals to a Belgian customer, Metaux Group Belge ("Metaux"), were not properly zero-rated, but were liable to VAT at the standard rate.

(2) The second ("the 2015 appeal"), which is referenced under TC/2015/03798, is an appeal against a decision of HMRC denying the deductibility of input tax in periods March 2013 (03/13) to September 2013 (09/13) and February 2014 (02/14).

3. The 2014 appeal has reached the stage of a statement of case having been delivered by HMRC, and the parties having exchanged lists of documents. Although, according to agreed directions which were issued to the parties on 30 March 2015, witness statements were also due to have been exchanged on 10 July 2015, an application was made by HMRC for a stay in anticipation of the 2015 appeal being lodged and the consolidation application being made in that respect. CFBL having objected to that stay application, the hearing was originally listed to consider it; in the event it was overtaken by the 2015 appeal having been made and the consequent application to consolidate.

4. The bases of the assessments to VAT concerned in the 2014 appeal are, first, that the evidence provided by CFBL is insufficient to support the zero-rating of the supplies to Metaux, and secondly (and in the alternative) that the purported transactions have all been traced to fraudulent tax losses and that CFBL (i) knew or should have known that the transactions were connected to fraud, and (ii) failed to take the appropriate steps to prevent its participation in the fraud.

5. As to the first basis, it is argued by HMRC that CFBL cannot show where it purchased the material which it claims to have sold to Metaux, that CFBL has been unable to demonstrate that the scrap metal which was the subject of the purported supplies to Metaux ever existed, that Metaux did not account for acquisition tax on the goods and there is no evidence of the goods having arrived in Belgium, that there

is no actual evidence that the goods moved out of the UK and that CFBL has not provided sufficient commercial evidence of the purported deals.

6. As to the second, HMRC say that CFBL was aware of the risks and prevalence of MTIC (missing trader intra-Community) fraud, and that (in essence) CFBL's due diligence was lacking and that there were unusual features of the Metaux deals which ought to have alerted CFBL to the possibility that Metaux was involved in fraud.

7. The 2015 appeal is against the decision of HMRC to deny CFBL an input tax deduction on purchases of mixed metals. That decision is based on the allegation by HMRC that the relevant transactions have been traced back to identified fraudulent tax losses in the periods in question, that CFBL had a general awareness of VAT fraud, dating back to 2007, that the nature of the deal chains suggests that the transactions were artificially contrived, and that CFBL's due diligence could not have provided it with adequate assurance that the transactions were not connected with the fraudulent evasion of VAT.

8. In each case CFBL strongly refutes the allegations made by HMRC.

Discussion

9. The principles to be applied in considering an application for consolidation can be derived from *Maharani Restaurant v Customs and Excise Commissioners* [1999] STC 295, in the High Court (Turner J). In that case the VAT tribunal had found that the evidence in both appeals overlapped considerably and that there would be a substantial saving in costs and time if they were both heard together. It found that consolidation would not give rise to a substantial risk of prejudice either to the partnerships or to any partner who was not common to both partnerships. The tribunal directed that in so far as evidence was relevant to both cases it should be evidence in both appeals.

10. The appellants appealed contending, first, that if the appeals were consolidated the effect would be to make one of the cases stronger, particularly since there was a risk that the evidence in one appeal might be used in the other appeal by way of evidence of similar facts, secondly that they were entitled to bring their appeals against the assessments which had been raised on them in any way that was most advantageous to them, and finally that HMRC's application had caused a substantial procedural delay.

11. The factors identified by Turner J as relevant to consideration of the application for consolidation may be summarised as follows:

(a) the degree of overlap of relevant evidence;

(b) the commonality of witnesses;

(c) the degree of difficulty in segregating different parts of the evidence in relation to separate appeals;

(d) the risk in separate appeals of the evidence and cross-examination in the second appeal being influenced by that in the first;

(e) the risk of evidence of witnesses in one case being believed, but in respect of the same evidential matters not being believed in the other case;

(f) the inconvenience of witnesses in being required to give evidence on two separate occasions in relation to essentially the same subject matter;

(g) whether delay will be occasioned by the appeals being consolidated; and

(h) the risk of prejudice if the appeals are heard either separately or together.

12. Describing, at p 300, the appellants' concern as to the risk of evidence in one appeal being used in the other appeal as similar fact evidence as "understandable", Turner J was nonetheless content that such a risk did not prejudice the appellants such that the appeals should not be consolidated. It was up to the tribunal hearing the consolidated appeal to make careful findings in that regard. Both the tribunal chairman (Theodore Wallace) and Turner J drew an analogy between the proceedings in the tribunal and those in a criminal court. Turner J took the view that it was inconceivable that, in the circumstances at issue, there would have been separate criminal trials.

13. In exercising any of its case management functions, this tribunal must have regard to the overriding objective, as expressed in Rule 2 of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009, namely to deal with cases fairly and justly. This translates into a balancing exercise in which the tribunal must have regard to all relevant factors, and take no account of irrelevant considerations.

14. Having said that, it is clear that on an application of this nature, the most relevant factors are those relating to the congruity of relevant evidence, and the prejudice to a party.

15. Turning first to the question of prejudice, Mr Lall argued that there was prejudice in this case to CFBL in that it was not possible at this stage to understand the relevance of the arguments raised in the 2014 appeal to those in the 2015 appeal and vice versa. The position reached in the 2014 appeal was only that the statement of case had been delivered. No evidence had been served. In the 2015 appeal there had as yet been no statement of case, and CFBL did not know what evidence was to be relied upon by HMRC.

16. Mr Lall referred to *Citibank NA v Revenue and Customs Commissioners* [2014] UKFTT 1063 (TC) for the proposition that even the statement of case might not provide sufficient information for CFBL to fully appreciate the case against it; the function of the statement of case is limited to describing the primary facts relied upon sufficiently to enable the issues to be identified by the appellant and by the tribunal. As described in *McPhilemy v Times Newspapers and others* [1999] 3 All ER 775, referred to in *Citibank* at [99], the pleadings, such as a statement of case, are required

to mark out the parameters of the case; it will be the witness statements that will describe the detail. Furthermore, as the tribunal found in *Ebuyer Ltd v Revenue and Customs Commissioners* [2014] UKFTT 912 (TC), at [37], an appellant may be expected to wait to read the witness evidence to ascertain more particularity about what is alleged the appellant knew or ought to have known.

17. On this basis, Mr Lall submitted that it was in any event premature for the question of consolidation of these appeals to be considered. It was not possible for the question of congruity of evidence to be determined until that evidence had been served. CFBL, he submitted, would be prejudiced by not having seen how HMRC would plead the case subject to the 2015 appeal. It appeared, he said, that HMRC was relying on a case based on a general knowledge of fraud on the part of CFBL.

18. I do not agree. Although such an argument might have force in some circumstances, where it might not be possible to ascertain the nature or relevance of evidence before it is available for detailed scrutiny, that is not so in this case. The nature of the evidence likely to be relied upon, as a general matter, by HMRC in cases where it is alleged that an appellant knew or should have known of the connection of its transactions with fraudulent evasion of VAT can be discerned by reference to the many similar cases that have been brought before the tribunal. The nature of such evidence, if not its detail, can be readily appreciated by CFBL. I do not therefore accept that there is any prejudice in this respect to CFBL in the timing of this application.

19. Mr Lall also argued that CFBL was prejudiced by the 2014 appeal appearing to have taken on a different dimension, as a result, it was apprehended, of the management of the two appeals within HMRC having changed by reason of the 2015 appeal being made. It was noteworthy in this connection, Mr Lall submitted, that the decision giving rise to the 2014 appeal had been made on 8 July 2014, whereas that in relation to the 2015 appeal had not been made until 17 March 2015. If HMRC had considered that the two matters were connected, it would have been open to them to make a single decision in those respects.

20. I do not accept that this gives rise to any prejudice for CFBL. The connection, or lack of it, between two appeals cannot be ascertained solely by reference to the timing of the decisions appealed against. The question of consolidation is not merely one of connection; it is one that must be considered in the light of all the relevant circumstances, of which the question of the congruity of evidence is a material factor. Such congruity may exist irrespective of the manner in which the decisions of HMRC appealed from have been arrived at or the timing of them.

21. This is not a case, such as that in *First Class Communications Ltd v Revenue and Customs Commissioners* [2013] UKFTT 342 (TC), where evidence for which congruity in the two appeals was being asserted was found to be based on an entirely new allegation, which was not present in the statements of case for either appeal, and in respect of which the tribunal permitted an amendment. The direction for consolidation was upheld on appeal as disclosing no error of law (see [2014] UKUT 0244 (TCC)). In this case, by contrast, the parameters of the individual cases are

clear, that of the 2014 appeal from the statement of case in that appeal, that of the 2015 appeal from the decision of HMRC from which CBFL has appealed. HMRC rely on those cases as so ascertained, each of which includes allegations of knowledge or means of knowledge of fraud on the part of CFBL. The respective cases have not, contrary to Mr Lall's argument, taken on a different dimension. Nor, as *First Class Communications* demonstrates, would that have been a decisive factor against the making of a direction for consolidation.

22. In the absence of any identifiable prejudice in these respects to CFBL, the question resolves itself into whether there is a congruity of relevant evidence in each of the appeals. Mr Carey argued that HMRC would be seeking to rely on the same evidence in relation to the grounds that CFBL knew or should have known of the fraud in the relevant deal chains, both as regards the fraud by the customer, Metaux, in the 2014 appeal, and the frauds by the alleged defaulters earlier in the supply chains in the 2015 appeal. That evidence would include evidence of the so-called "broker officer", namely the officer with knowledge of CFBL itself, and witnesses in relation to the defaulting traders. The issue of knowledge, which included evidence as to CFBL's knowledge generally of MTIC fraud within its industry, was central to both appeals.

23. As to the central nature of the evidence of knowledge, Mr Lall pointed out that HMRC's principal argument in the 2014 appeal focused on what was alleged to be the inadequacy of the evidence produced by CFBL to support the zero-rating of the relevant supplies to Metaux. The case based on whether CFBL knew or should have known of the fraud of Metaux was relied upon only in the alternative. However, I do not consider that can be a material factor. True it is that HMRC's case in respect of the 2014 appeal is pleaded in the alternative, but that fact does not diminish the ground based on knowledge or relegate it somehow to subsidiary argument status. It is simply an alternative, and has to be regarded as a principal case in its own right.

24. Although HMRC's case in each appeal is, or includes, that CFBL knew or should have known of fraud connected with its relevant transactions, there are differences between the two appeals, which Mr Lall highlighted. Other than procedural differences, in summary:

(1) The 2014 appeal concerns output tax; the 2015 appeal concerns input tax.

(2) The relevant periods in each appeal only overlap to the extent of 03/13, and Mr Lall argued that in any event there was no overlap in relation to the transactions in question.

(3) There is a material difference in the amounts of VAT at stake. In the 2014 appeal it is £160,281.50; in the 2015 appeal it is £2,607,778.65.

(4) Different metals were supplied by CFBL in each case.

(5) In the 2014 appeal the focus is on the buyer, namely Metaux, which is alleged to be the perpetrator of the fraud. The decision which is the subject of the 2015 appeal refers only to the suppliers from whom CFBL acquired the relevant materials, none of which include Metaux, but gives no information as

to by whom or at which point in the transaction chains the alleged fraud occurred. Mr Lall makes the point in this regard that this case is therefore different from that in *First Class Communications*, where there was one common supplier in the two appeals sought to be consolidated.

25. In my judgment none of these differences can militate against consolidation. The essential common feature is the case made by HMRC that CFBL knew or should have known of fraudulent evasion of VAT. It is not necessary for the two appeals both to be concerned with an assessment to output tax, or both to be concerned with denial of input tax; it is not the result, but the reason for the decision that is material. Nor can the different amounts of VAT at stake or the differences in the goods supplied lead to a conclusion that the appeals should be dealt with separately.

26. It is true that there is only a short period of overlap between the VAT periods concerned in the 2014 appeal and those in the 2015 appeal. Such an overlap is not of itself a material factor in favour of consolidation. But nor are the periods materially different such that evidence in relation to CFBL's activities and processes in one period could have no relevance to those matters in another period. Taken as a whole, the period in question, from October 2012 to February 2014 can be regarded as a single continuing period for which evidence of CFBL's activities and processes will be relevant, both in respect of HMRC's case but importantly also to the case which CFBL seeks to make. The same applies to periods outside those in which the transactions took place, which may be relied upon by both parties as illustrating the course of trading of CFBL, its knowledge of the existence of fraud in its industry and the steps it took in that regard.

27. Congruity of identity of third parties in the transactions in question could be a material factor in determining whether appeals should be joined or consolidated. Lack of such congruity is likewise a relevant factor, but it is not decisive. Where the question concerns the actual or constructive knowledge of the trader, the fact that the allegations concern a number of different transactions, involving different suppliers and different customers, as well as different frauds, does not point towards those transactions each being the subject of a single appeal. In the same way that it could not properly be suggested that the individual transactions in the 2015 appeal should be separated into individual appeals, nor can the fact that Metaux features only in the case put by HMRC in respect of the 2014 appeal lead to the conclusion that that appeal should be dealt with separately from the 2015 appeal.

28. The essential question in this application is the extent to which evidence in the 2015 appeal will be relevant to HMRC's case, which is to say its alternative case, in the 2014 appeal.

29. Mr Lall drew my attention in this respect to the risk of unfair prejudice that could arise in the use of similar fact evidence, as highlighted in *O'Brien v Chief Constable of South Wales Police* [2005] UKHL, [2005] 2 All ER 931. In that case, the claimant brought proceedings against the defendant chief constable for misfeasance on public office. He wished to adduce evidence concerning alleged impropriety of certain named police officers. The evidence was admitted and the defendant appealed, arguing that similar fact evidence was only admissible in a civil

suit if it was likely to be reasonably conclusive of a primary issue in the proceedings or if it had enhanced relevance so as to have substantial probative value.

30. The House of Lords drew a distinction between the test of admissibility of similar fact evidence in criminal proceedings and the test in civil proceedings. In the former, there is a requirement of enhanced relevance or substantial probative value. This is because, if the evidence is not cogent, the prejudice it will cause to the defendant may render the proceedings unfair. However, as Lord Phillips made clear at [53], there is no warrant for the automatic application of this test as a rule of law in a civil suit. Thus, the test of admissibility of similar fact evidence in a civil suit is whether it is "potentially probative" of an issue in the action.

31. On the other hand, the policy considerations that have given rise to the more stringent rules of criminal evidence must be borne in mind by a court or tribunal in determining whether, in a particular case, evidence which is admissible in civil proceedings should be so admitted. Thus, the question of prejudice must be considered; evidence of impropriety, which was in issue in *O'Brien*, which reflects adversely on the character of a party, may risk causing prejudice that is disproportionate to its relevance.

32. In these appeals, I have concluded that the evidence of the activities and processes of CFBL over the whole period covered by the two appeals, and in respect of periods outside those in issue in the appeals, is relevant to the case put in each of them as regards the knowledge, actual or constructive ("knew or should have known") of CFBL. There can be no doubt as to the potentially probative value of the evidence taken as a whole. It has been made clear that evidence of the surrounding circumstances of a transaction may be probative of the relevant knowledge of the trader in respect of that transaction. Whilst the question of knowledge must be related to the connection to fraud of individual transactions, relevant and probative evidence is not confined to evidence in relation only to those transactions viewed individually. It can, in particular, include similar fact evidence.

33. In *Mobilx Ltd (in administration) v Revenue and Customs Commissioners* [2010] STC 1436, a case concerning MTIC fraud, Moses LJ, at [83], approved the following passage from the judgment of Christopher Clarke J in *Red 12 Trading Ltd v Revenue and Customs Commissioners* [2010] STC 589:

> "[109] Examining individual transactions on their merits does not, however, require them to be regarded in isolation without regard to their attendant circumstances and context. Nor does it require the tribunal to ignore compelling similarities between one transaction and another or preclude the drawing of inferences, where appropriate, from a pattern of transactions of which the individual transaction in question forms part, as to its true nature eg that it is part of a fraudulent scheme. The character of an individual transaction may be discerned from material other than the bare facts of the transaction itself, including circumstantial and 'similar fact' evidence. That is not to alter its character by reference to earlier or later transactions but to discern it.

> [110] To look only at the purchase in respect of which input tax was sought to be deducted would be wholly artificial. A sale of 1,000 mobile telephones may be entirely regular, or entirely regular so far as the taxpayer is (or ought to be) aware. If so, the fact that there is fraud somewhere else in the chain cannot disentitle the taxpayer to a return of input tax. The same transaction may be viewed differently if it is the fourth in line of a chain of transactions all of which have identical percentage mark ups, made by a trader who has practically no capital as part of a huge and unexplained turnover with no left over stock, and mirrored by over 40 other similar chains in all of which the taxpayer has participated and in each of which there has been a defaulting trader. A tribunal could legitimately think it unlikely that the fact that all 46 of the transactions in issue can be traced to tax losses to HMRC is a result of innocent coincidence. Similarly, three suspicious involvements may pale into insignificance if the trader has been obviously honest in thousands.
>
> [111] Further in determining what it was that the taxpayer knew or ought to have known the tribunal is entitled to look at the totality of the deals effected by the taxpayer (and their characteristics), and at what the taxpayer did or omitted to do, and what it could have done, together with the surrounding circumstances in respect of all of them."

34. In my judgment, there would no prejudice to CFBL from the admission of evidence relevant to the 2015 appeal into the 2014 appeal and vice versa. Such evidence would be both relevant and potentially probative in both appeals. It is necessary for the tribunal in both appeals to have regard to all the facts and circumstances of the case. That follows both from the judgment of the Court of Justice of the European Union in *Mecsek-Gabona Kft v Nemzeti Adó- és Vámhivatal Dél-dunántúli Regionális Adó Foigazgatósága* (Case C-273/11) [2013] STC 171, at [53], which relates to the conditions for exempting (or, in the UK, zero-rating) intra-Community transactions, and which is relied on by HMRC in the 2014 appeal, and the express adoption of the same test at [32] in the judgment in *Bonik EOOD v Direktor na Direktsia 'Obzhalvane i upravlenie na izpalnenieto'–Varna pri Tsentralno upravlenie na Natsionalnata agentsia za prihodite* (Case C-285/11) [2013] STC 773, concerning the right to deduct, in which the Court emphasised the application of the test propounded in *Kittel v Belgium; Belgium v Recolta Recycling SPRL* (Joined cases C-439/04 and C-440/04) [2008] STC 1537 which forms the basis of HMRC's case in the 2015 appeal.

35. It follows that I consider that the appropriate course, in the interest of fairness and justice, is to direct consolidation of these two appeals. I do not consider that it is premature to do so. Such a direction should be made at the earliest practicable opportunity consistent with the tribunal being able to carry out the necessary balancing exercise. That, as I have explained, is capable of being done in this case without injustice to either party. Early consolidation will reduce delay and enable case management directions to be given for the appeals as a whole with a view to CFBL being provided with particulars of HMRC's entire case as early as possible.

Decision

36. HMRC's application for these appeals to be consolidated is allowed. I have made consequential directions which have been released to the parties.

Application for permission to appeal

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

ROGER BERNER
TRIBUNAL JUDGE

RELEASE DATE: 13 AUGUST 2015