TC04587

Appeal number: TC/2014/5334 and 5340

VAT – strike out application - misdeclaration penalty assessed following strike out of MTIC appeal – appellant seeking to argue in penalty appeal that there was no connection to fraud and no knowledge or means of knowledge – whether abuse of process – yes, except for case that appellant had no actual knowledge –whether no actual knowledge could be a reasonable excuse – no, as test objective – other grounds also had no reasonable prospect of success – all grounds of appeal struck out save that appellant entitled to put case that penalty is disproportionate

FIRST-TIER TRIBUNAL
TAX CHAMBER

FONESHOPS LTD **Appellant**

- and -

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

TRIBUNAL: JUDGE Barbara Mosedale

Sitting in public at the Royal Courts of Justice, London on 28 July 2015

Mr M Shakeel, Director, for the Appellant

Mr J Carey, Solicitor, of HMRC Solicitors Office, for the Respondents

DECISION

1. The appellant appeals against two decisions:

(1) The review decision of HMRC dated 3 September 2014 upholding an HMRC decision dated 27 June 2014 charging the appellant company to a VAT misdeclaration penalty of £3,214,874 in respect of periods 03/06, 04/06 and 05/06 (TC/2014/5334); and

(2) The refusal by HMRC to repay £64,985.31 in alleged input tax claimed on alleged expenses incurred in the appellant's business on the grounds that the invoices were invalid and/or supplies did not take place and/or were not paid for and/or input tax had already been repaid and/or claims was out of time (TC/2014/5340).

2. On 5 December 2014 HMRC applied to strike out what I will refer to as the penalty appeal (TC/2014/5334). The appellant then applied to stay what I will refer to as the expenses appeal (TC/2014/5340) behind the penalty appeal. Both applications came before me on 28 July 2015. As agreed at the hearing, it makes sense to deal with the strike out application first, as if the penalty appeal is struck out, there is nothing behind which to stay the expenses appeal.

The background

3. The relevant background to the hearing before me was not contentious and I set it out as follows:

4. The appellant submitted returns for VAT periods 11/05, 03/06, 04/06 and 05/06 in which it reclaimed input tax totalling £25,330,113.58. On 11 June 2009 HMRC denied the appellant the right to recover this input tax. The denial was on the grounds that the input tax was incurred in some 181 transactions which were connected to missing trader intra-community ('MTIC') fraud and either the appellant knew this or ought to have known this and that therefore under the doctrine explained by the CJEU in *Kittel* it was not entitled to recover the input tax.

5. The appellant appealed this decision and its appeal was given reference TC/2009/11840. I will refer to this as the MTIC appeal. Following a failure to serve its evidence on the due date, on 21 February 2012 the Tribunal issued a direction by Judge Berner that the appellant should serve its witness statements including exhibits not later than 4 May 2012 and that a failure to comply would lead to the proceedings being struck out.

6. Foneshops did not serve its witness evidence. HMRC applied on 10 May 2012 for the appeal to be struck out. A hearing of that application took place on 27 June 2012. Immediately before the hearing the appellant served its witness statements.

7. At that hearing, Judge Khan struck out the appeal and that decision was notified to the parties on 29 June 2012. At the same time the appellant was notified of its right to apply for reinstatement.

8. The appellant applied for reinstatement on 31 July 2012. That application was heard by Judge Berner over two days in 2013 and, on 22 November 2013, it was refused. A full decision was released and its neutral citation number is: [2013] UKFTT 675 (TC).

9. The appellant applied for permission to appeal that decision. In this Tribunal permission was refused. It was also refused by the Upper Tribunal on 3 March 2014. That therefore was the end of the appellant's MTIC appeal.

10. On 27 June 2014 HMRC issued a misdeclaration penalty to the company under s 63 Value Added Tax Act 1994 ("VATA"). The letter had as a part of its heading the name of the appellant (although this also appeared in the 'address'). Next to the name in the heading it said "company registration number – 04231696". It is accepted by HMRC that this is not the correct company registration number for the appellant. The document also contained the VAT registration number of the appellant and the correctness of that number is not in dispute.

11. The review decision was dated 3 September. It was addressed to Foneshops Ltd, but it did not contain a statement of the company's registration number. It did refer to the matter as the error had been pointed out by Mr Shakeel in correspondence:

> "I note that the decision letter of 27 June 2014 quoted the wrong Company Registration Number. This was an error for which I can only apologise however (sic) it does not impact on the content of that letter."

12. The appellant lodged an appeal in time with this Tribunal against the penalty and that is the appeal now before me.

The strike out application

13. HMRC's application to strike out the penalty appeal was made under Rule 8(3)(c) on the grounds that HMRC considered that "there is no reasonable prospect of the appellant's case…succeeding".

14. The appellant's notice of appeal was brief. It stated:

> I believe (sic) had reasonable excuse.
>
> Unforeseen events which have adversely affected the business.
>
> Circumstances of the case which lead (sic) to any errors.
>
> Compassionate acting on the information provided their (sic) was no way of doing anything different (sic) at the time in question
>
> Did not believe I was doing anything wrong and had never been told otherwise by HMRC.

I don't belive Foneshops have made a misdeclaration

There was no way of doing anything different"

15. The appellant applied successfully to postpone the first hearing on 6 May 2015 that was booked to consider the strike out application. Judge Raghavan directed that the appellant should particularise its grounds of appeal not later than 3 June 2015. The appellant did not do so until 27 July 2015, which was the day before the hearing in front of me. But HMRC took no point on this late compliance and I do not consider it relevant to the issue before me so I do not mention it again.

16. Having read the appellant's particularised grounds of appeal served the day before the hearing, which ran to some 16 pages, HMRC's position was that virtually all of them amounted to an attempt to re-litigate the MTIC appeal and that the appellant could not do so, and that in the absence of any other grounds of appeal, the appeal should be struck out as lacking any prospect of success.

17. I have read the grounds of appeal and, subject to a few exceptions mentioned at §20 below, I agree with HMRC that all of the grounds raise issues that would have been decided in the MTIC appeal had it gone to hearing. Without going through the 16 pages in detail, the alleged grounds can be summarised as making the following claims:

- Trader's experience in the business; effective due diligence; due diligence would not have discovered the fraud; it is not for appellant to police the industry;
- HMRC had earlier repaid claims arising out of transactions with the same suppliers as those in the deals in which tax was denied; HMRC had failed to warn appellant of fraud; the appellant did not foresee its input tax being denied.
- HMRC took a policy decision to deny all traders in the sector their input tax
- Fraud in supply chain was not proved; there was no fraud in supply chains where contra trading alleged.

18. These 16 pages therefore amplified and explained the very brief grounds of appeal set out in the Notice of Appeal. But in brief summary they amounted to a claim that there was no misdeclaration and/or it had a reasonable excuse for the misdeclaration because there was no fraud in its supply chains, and even if there was, it did not know of it and could not have known of it.

19. The Notice of Appeal did contain reference to "unforeseen events" and "no way of doing anything different" which were perhaps not obviously related to a claim that there was no knowledge and no means of knowledge. Mr Shakeel explained them as follows. The alleged 'unforeseen events' (§14 above) were HMRC's unanticipated withholding of the input tax the subject of the MTIC appeal. The ground that "There was no way of doing anything different" was explained as meaning that the appellant had done all that it could to verify its trades, and had had a great many repayments of input tax to it paid by HMRC in the past, and so could not have anticipated the refusal to repay. In so far as these grounds were a reiteration of the claim that there was no

knowledge or means of knowledge of the fraud in the supply chain, I deal with this below when dealing with the MTIC grounds of appeal. In so far as Mr Shakeel attached importance to the appellant's failure to anticipate HMRC withholding the input tax, that is dealt with simply now. The failure to repay the input tax obviously occurred *after* the claim was made to recover it: the failure to repay, or any policy decision by HMRC to refuse all claims, did not *cause* the claim to be made and therefore could not be a reasonable excuse for the misdeclaration being made. But in so far as it was a claim that the appellant's failure to anticipate HMRC's refusal to repay amounts to a reasonable excuse, this is all part of its claim that it had no means of knowledge and I deal with that below as part of the MTIC grounds of appeal.

20. The additional grounds of appeal, which related specifically to the penalty appeal, and did not duplicate the MTIC grounds of appeal, and which were mentioned in the particularised grounds of appeal and/or the hearing but not in the Notice of Appeal, were the following allegations:

(1) The assessment was void because it gave the wrong company registration number for the appellant company;

(2) The assessment is out of time;

(3) The assessment is in the wrong amount;

(4) Even if the appellant ought to have known of fraud in its supply chain, HMRC were in breach of its public law duty to protect traders from such fraud and that amounts to a reasonable excuse.

Abuse of law and issue estoppel

21. HMRC's case was that I ought to strike out the penalty appeal as it had no reasonable prospect of success. Its case was that with the exception of the four matters mentioned at §20, the appellant's grounds of appeal were the issues that would have been decided in the MTIC appeal; the appellant could not re-run the same issues in another appeal; therefore there was no real prospect of it winning the penalty appeal.

22. There are really two issues here. The first is whether abuse of process and/or issue estoppel as a matter of law applies to this appeal; the second is, if it does, does that mean that the appellant can not put the case set out in its particularised grounds of appeal.

Issue estoppel

23. It seems established that 'issue estoppel' is a part of the doctrine of 'res judicata' (a latin tag which, I assume, might be roughly translated as 'already adjudicated' and which simply means that matters already re-litigated cannot be re-litigated). It was explained by Lord Keith in *Arnold v NatWest Bank Plc* [1991] 2AC 93 where he drew the following distinction between cause of action estoppel and issue estoppel, which are both elements of res judicata:

> "Cause of action estoppel arises where the cause of action in the later proceedings is identical to that in the earlier proceedings, the latter having been between the same parties … and having involved the same subject matter. In such a case the bar is absolute in relation to all points decided unless fraud or collusion is alleged, such as to justify setting aside the earlier judgment. The discovery of new factual matter which could not have been found out by reasonable diligence for use in the earlier proceedings does not … permit the latter to be re-opened.
>
> …
>
> Issue estoppel may arise where a particular issue forming a necessary ingredient in a cause of action has been litigated and decided and in subsequent proceedings between the same parties involving a different cause of action to which the same issue is relevant one of the parties seeks to re-open that issue."

24. There is no question of *cause of action estoppel* here, and HMRC do not suggest there is: the appellant does not seek to re-open the MTIC appeal. It accepts that its claim for the £25 million plus is dead. But *issue estoppel* might arise because the appellant wishes to raise in the penalty appeal the same factual questions as would have to have been decided in the MTIC appeal had it gone to hearing.

25. However, issue estoppel does not appear to have any actual application in tax cases. In *Cafoor* [1961] AC 584 PC it was held that a decision in one tax year does not create an issue estoppel for another tax year. That doctrine was held to apply as much to VAT as direct tax cases in *Littlewoods* [2014] EWHC 868 (Ch) at §190.

26. In that case, there had (in effect) been the equivalent of an FTT decision finding that HMRC was liable to repay an amount of VAT to Littlewoods, on the basis Littlewoods had overpaid it. Littlewoods then made a claim in the High Court against HMRC for restitution for an amount equivalent to interest on the overpaid VAT. HMRC sought to defend the claim to interest on the grounds it was not due as the VAT had not actually been overpaid and should not have been repaid to the appellant. Littlewoods relied on the doctrine of issue estoppel.

27. Mr Justice Henderson's conclusion at §206(1) was that HMRC could raise the question of whether the VAT was due in proceedings for interest on the sums that were repaid following what was in effect a tribunal determination that the VAT was not due. In other words, Mr Justice Henderson appeared to consider that there was no issue estoppel in a tax case even where exactly the same VAT accounting period was concerned, as long as a different liability was concerned. In this he followed the earlier decision of the High Court in *King v Walden* [2001] STC 822. In that case Mr Justice Jacobs held that decisions of (in effect) the first instance tax tribunal only created issue estoppel as to the actual liability to tax decided by that appeal. So that the taxpayer or HMRC could re-open the question of that liability to pay tax all over again where the issue under appeal was something different, such as, as it was in those two cases, liability to pay interest on the tax. Both High Court judges considered that they were obliged to reach this conclusion by higher authority.

28. This is much the same as saying there is no issue estoppel in tax cases, only cause of action estoppel. I am, of course, bound by both these decisions of the High Court. If there effectively is no issue estoppel in actions for interest on tax over or underpaid, then it seems an irresistible conclusion that a tribunal determination on liability to VAT cannot create an issue estoppel in penalty actions arising out of that liability.

Abuse of process

29. However, having said that, the doctrine of *abuse of process* is not part of the doctrine of *res judicata*, and it is still applicable to tax cases. In *Littlewoods,* Henderson J held that HMRC were unable to advance the position that the tax was not due in defending the claim for interest because to do so would be an abuse of process, irrespective of the non-application of issue estoppel to tax cases: [250]. So the fact that issue estoppel does not apply to tax cases appears to be no bar to a court concluding that re-opening a decided issue is an abuse of process.

30. HMRC relied on *Hunter v Chief Constable of the West Midlands Police* [1982] AC 529 for a statement of what abuse of process was:

> "…[abuse of process] concerns the inherent power which any court of justice must possess to prevent misuse of its procedure in a way, which although not inconsistent with the literal application of its procedural rules, would nevertheless be manifestly unfair to a party to litigation before it, or would otherwise bring the administration of justice into disrepute among right-thinking people" page 536 C per Lord Diplock.

31. The statement in *Hunter* is very general and there might be room for doubt whether it extends to the circumstances in this case. However, the authorities of *Littlewoods* at §250 and *SCF Finance Co Ltd v Masri* [1987] 1 QB 1028 are more specific. Abuse of process appears to be very like issue estoppel save perhaps for flexibility where there are special circumstances:

> "a litigant who has had an opportunity of proving a fact in support of his claim or defence and has chosen not to rely on it is not permitted afterwards to put it before another tribunal…..
>
> …it would be an abuse of process of the court to raise in subsequent proceedings matters which could and should have been litigated in earlier proceedings…" page 1049 C-F, per Ralph Gibson LJ delivering the unanimous judgment of the Court of Appeal , also citing Lord Kilbrandon in the Privy Council that abuse of process
>
> " '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.' "

And unlike issue estoppel, abuse of process applies to tax cases. So I find that abuse of process does prevent previously litigated issues being re-tried between the same parties in tax cases unless there are special circumstances.

32. However, in this case, there is no question of the issues which Mr Shakeel wants to raise in the penalty appeal having been previously actually adjudicated upon. The MTIC appeal was struck out without being heard. However, HMRC's position is that that does not prevent abuse of process arising. HMRC's view is that the appellant lost the MTIC appeal (because it was struck out) and must therefore be treated as if the Tribunal had made its decision against the appellant. They compare the situation to one where the appellant withdraws the appeal: under s 85(4) Value Added Tax Act 1994 ("VATA") the appellant is treated as having lost the appeal.

33. For this proposition, HMRC also relied on *SCF Finance Co Ltd* where the Court of Appeal gave a decision which did not really distinguish between issue estoppel and abuse of process but did decide that conduct leading to an order dismissing an appeal could prevent the issue being relitigated later as such an order must be <u>treated as if</u> the proceedings were dismissed:

> "an order dismissing proceedings is capable of giving rise to issue estoppel even though the court making such order has not heard argument or evidence directed to the merits….the effect of the second defendant declining to proceed with the hearing and acknowledging that her application must be dismissed, must in our judgment have been finally to determine the issue against the second defendant" page 1047 G and

34. It was HMRC's case that the appellant's own failure to obey an unless order without good reason was the cause of the MTIC appeal being struck out and that was at the very least negligent conduct (see the quotation for *SCF* at §30 above), and in any event was clearly conduct which could be criticised and not even mere inadvertence or accident, so the Tribunal ought to shut out the appellant from raising in the penalty appeal an issue which could and should have been litigated in the MTIC appeal. In HMRC's opinion, there were no special circumstances to lead to non-application of the rule as stated in *SCF Finance Co Ltd v Masri.*

35. Mr Shakeel did not really engage with the legal authorities on this matter. He reasoned that it was very unfair, particularly bearing in mind the size of the penalty, if the Tribunal hearing the penalty appeal was shut out from considering all the relevant facts of the case. He pointed out that the MTIC appeal had never been heard and HMRC had never actually proved that the appellant's transactions were connected to fraud and that either the appellant knew this or should have known this. He considered that it was one thing to have his input tax appeal struck out, but quite another if he was effectively unable to defend his company against a £3 million penalty.

36. Mr Shakeel further considers it very unjust that he should have the penalty appeal struck out *because* the MTIC appeal was struck out, when he still considers

that the Tribunal was quite wrong in the conclusions it came to in the appellant's reinstatement application. In particular, Mr Shakeel maintains that, contrary to the conclusions reached by the Tribunal at (3) on page 18 of the reinstatement application, that he was unaware of the unless order. He considers the Tribunal should have reinstated his appeal, although he accepts that its decision not to do so is final as he was refused permission to appeal it.

Conclusions on abuse of process

37. I did not consider the merits of the appellant's claim that the transactions were not connected to fraud, or, if they were, it did not know and could not have known. I did not have the evidence to consider whether factually its claim has a reasonable prospect of success and in any event HMRC accepted that *if* the appellant could argue the issues of fraud and/or knowledge and means of knowledge, then there was an issue to go to trial. The question I considered was whether the appellant should be permitted to argue that there was no fraud and/or no knowledge or means of knowledge of it.

38. My conclusion on the question of abuse of process is that I agree with HMRC, that, barring special circumstances, it would be an abuse of the litigation process if the appellant were able to raise in this appeal an issue that was effectively decided against it when its MTIC appeal was struck out. While the appellant complains it is unfair if all the facts are not considered in his penalty appeal, that is really the point: the facts he wants considered are the facts that ought to have been considered in the MTIC appeal. The appellant's own conduct led to that appeal being lost and in my view, based on the above binding authority in *SCF*, the same consequences must flow as if the hearing had taken place and the Tribunal had decided against the appellant. For true fairness, there must be finality in litigation. There is no second bite of the cherry. The MTIC appeal was the appellant's *only* opportunity to litigate the question of connection to fraud and knowledge/means of knowledge of these 181 transactions. It threw away that opportunity by failing to comply with an unless order and lost the appeal: barring special circumstances, it cannot have another opportunity now to argue the same issues, albeit the subject matter of the appeal (a £3 million penalty) is different to the subject matter of the MTIC appeal (a £25 million input tax rejection).

39. But Mr Shakeel, even though he does not phrase it in this way, is putting the case that there are special circumstances. The special circumstances he claims are that (in his view) the appellant should not be seen as having thrown away the opportunity to litigate: the MTIC appeal should have been reinstated (because, he says, the Judge was wrong to find that he knew of the unless order).

40. But the answer to that is the same as to the MTIC appeal as a whole, except that in this instance the reinstatement hearing did take place and the appellant did have the opportunity to put its case and present its evidence concerning the reasons for its non-compliance with the unless order. It does not, barring special circumstances, get a second chance to put the case that Mr Shakeel was unaware of the unless order. And no special circumstances were suggested – other than Mr Shakeel's mere statement that he thought the Judge was wrong. But there is no second bite at the cherry: it was

denied permission to appeal the reinstatement decision on the basis that the appeal stood no prospect of success. Whatever his personal view of the merits of his case, true fairness requires an end to litigation. The appellant cannot, without special circumstances, in these proceedings challenge the outcome of the reinstatement hearing. Therefore, as there are no special circumstances, that judgment is final, the decision of Judge Berner at (3) of §73 on page 18 stands, and therefore it is not open in these later proceedings with the same litigant, for Mr Shakeel to suggest that he did not know of the unless order. Therefore, I must treat the reinstatement decision as correctly decided and therefore there are no special circumstances such that the appellant should be allowed to re-open matters that were in issue in the appellant's unsuccessful MTIC appeal. It would be an abuse of process, and against natural justice, were that to happen.

Effect on grounds of appeal

41. So I move on to consider whether the appellant is seeking to re-open an issue that was an issue in the MTIC appeal.

42. As I have said, the appellant's 16 pages of grounds can be summarised (with the exception of matters outlined at §20 above) into a statement that its transactions (or some of them) were not connected to fraud, and even if some or all of them were connected to fraud, the appellant did not know and could not have known of it. However, those are exactly the issues that the Tribunal would have had to resolve if the MTIC appeal had not been struck out.

43. In so far as it is put forward as a basis for saying that therefore there was no misdeclaration, the appellant is seeking to re-run the MTIC appeal. It wants the exact same issue re-litigated although in a different context: the MTIC appeal was to resolve whether it was entitled to the reclaimed input tax: in so far as the appellant's claim in the penalty appeal is that there was no misdeclaration, it is claiming that it *was* entitled to the reclaimed input tax.

44. In other words, in claiming in this appeal that (a) its transactions were not connected to fraud and/or (b) it did not know and could not have known of any such connection it is claiming that it was entitled to the input tax and that there was therefore no misdeclaration. It is asking for *exactly the same issue* to be re-litigated, albeit in the context of a penalty assessment rather than a denial of an input tax reclaim.

45. And in so far as the appellant accepts that there was a misdeclaration, but claims it had a reasonable excuse for the misdeclaration, it is really asserting a nonsense because its grounds for claiming a reasonable excuse are the same grounds as claiming there was no misdeclaration. If there was no misdeclaration, there is no need for a reasonable excuse. Even if phrased as a reasonable excuse, the appellant is here seeking to re-litigate exactly the same issues that would have had to be resolved in the MTIC appeal.

46. However, there is a caveat to that. When the MTIC appeal was struck out, the appellant lost its appeal. HMRC had alleged that there was connection to fraud and that the appellant knew or ought to have known of it; the appellant failed to defend that claim successfully. The resolution of the MTIC appeal was that therefore the appellant's relevant transactions *were* connected to fraud and either the appellant knew this or should have known this. Knowledge is a more serious allegation than means of knowledge so I must proceed on the basis that, while the appellant lost the appeal, nothing more than 'means of knowledge' must be taken as proved against it.

47. So in so far as the appellant's grounds of appeal in the penalty appeal are that there was no connection to fraud, whether put forward to support a submission that there was no misdeclaration or there was a reasonable excuse for the misdeclaration, it is seeking to re-litigate an issue that was (in effect) decided against it when its MTIC appeal was dismissed. It is seeking to re-litigate that in proceedings with the same parties. That is an abuse of process. There are no special circumstances. I will not permit this issue to be raised.

48. And in so far as the appellant's grounds of appeal amount to saying that it had no 'means of knowledge', whether put forward to support a submission that there was no misdeclaration or there was a reasonable excuse for the misdeclaration, then again it is it is seeking to re-litigate an issue that was (in effect) decided against it when its MTIC appeal was dismissed. It is seeking to re-litigate that in proceedings with the same parties. That is an abuse of process. There are no special circumstances. I will not permit this issue to be raised.

49. However, in so far as the appellant's grounds of appeal in the penalty appeal amount to saying that it had no <u>*actual*</u> knowledge of the fraud, I do not think it can be said that it is seeking to re-litigate an issue that was in effect decided against it when its MTIC appeal was struck out. As I have said, knowledge is the more serious allegation and therefore, when the appeal was struck out, only the less serious allegation (means of knowledge) can be taken as having been unsuccessfully defended. The appellant's *actual* knowledge is therefore <u>*not*</u> an issue that has already been decided. It would not be an abuse of process for this issue to be raised.

50. In claiming that it did not know of the fraud, the appellant is not actually re-litigating the issue of liability. There would have been a misdeclaration in any situation where a taxpayer reclaimed input tax on a transaction which was (a) connected to fraud and (b) the taxpayer had means of knowledge of the fraud. Even if the taxpayer was entirely honest, there would still have been a misdeclaration.

51. But, accepting that there was a misdeclaration because there was (a) connection and (b) means of knowledge, is lack of actual knowledge a reasonable excuse? That depends on whether the test of reasonable excuse is objective or subjective.

52. In my view, if the question is whether, <u>objectively</u>, the appellant behaved as a reasonable person would have behaved in reclaiming the tax, that is indistinguishable from the question of whether it *ought to have known of the connection to fraud.* The question of 'ought to have known' is objective. Would a reasonable person have

inferred that there was fraud? If a reasonable taxpayer ought to have known of the connection to fraud, it would have known, and it would not have entered into the transaction in the first place, and would therefore not have reclaimed the input tax to which it was not entitled. A person who ought to have known of the connection to fraud but carried out the transaction anyway would therefore not be behaving as a reasonable person would behave and would not have a reasonable excuse for the misdeclaration.

53. But if 'reasonable excuse' is subjective and concerned with whether a taxpayer acted honestly rather than reasonably, then if the taxpayer actually did not know of the connection to fraud, there was no reason why that particular taxpayer should not have entered into the purchases in issue and then reclaimed the input tax.

54. The question of whether 'reasonable excuse' is an objective or subjective test to me seems critical in this strike out application. If the test is objective, then appellant's only suggested reasonable excuse is nothing more than an abusive attempt to re-litigate what has already been decided against it. Even if the test is subjective, then the appellant's attempt to re-litigate the questions of (1) connection and/or (2) means of knowledge is not permissible as it is an attempt to re-litigate what has already been decided against it and that is an abuse of process. But if the test is a subjective test, then, to the extent the appellant is claiming it did not actually know of the fraud, then that has not been litigated before and the appellant must have the right to litigate it now.

55. So is "reasonable excuse" an objective or subjective question?

The test for reasonable excuse

56. My own view is that Parliament, in using the words "reasonable" intended the test to be objective: was the taxpayer behaving as a reasonable taxpayer would behave? But the contrary view has been expressed in this Tribunal. In *David Wake-Walker Ltd* [2013] UKFTT 717 (TC) the Judge decided that

> "Accordingly, we must direct ourselves that if we accept as a matter of fact, that the appellant held an honest belief in a state of fact sufficient to amount to an excuse which, when viewed objectively, amounts to a reasonable excuse, there is no room for us to ask whether a reasonable person would or would not have held the identified honest belief. That would be an error of law."

While I may find that a surprisingly interpretation of 'reasonable excuse', I note that that decision is under appeal to the Upper Tribunal and due to be heard in December this year.

57. Should I therefore wait for the outcome of that Upper Tribunal case before deciding this application? *Wake-Walker* concerned 'reasonable excuse' in a direct tax context. It is not necessarily the case that 'reasonable excuse' has the same meaning in a VAT context. Where the expression is used in s 63 VATA, the

provision under which the penalty was imposed in this appeal, the context, to me, makes it clear that the test is objective. The relevant provisions are as follows:

> **S 70 mitigation of penalties under sections 60, 63, 64 and 67**
>
> (1) Where a person is liable to a penalty under section … 63 …, the commissioners or, on appeal, a tribunal may reduce the penalty to such amount (including nil) as they think proper.
>
> (2) ….
>
> (3) None of the matters specified in subsection (4) below shall be matters which the Commissioners or any tribunal shall be entitled to take into account in exercising their powers under this section.
>
> (4) Those matters are –
>
> (a) the insufficiency of funds available to any person for paying any VAT due or for paying the amount of the penalty;
>
> (b) the fact that there has, in the case in question or in that case taken with any other cases, been no or no significant loss of VAT;
>
> (c) the fact that the person liable to the penalty or a person acting on his behalf has acted in good faith.
>
> **S 71 Construction of sections 59 to 70**
>
> (1) For the purpose of any provision of sections 59 to 70 which refers to a reasonable excuse for any conduct –
>
> (a) an insufficiency of funds to pay any VAT due is not a reasonable excuse; and
>
> (b) where reliance is placed on any other person to perform any task, neither the fact of that reliance nor any dilatoriness or inaccuracy on the part of the person relied upon is a reasonable excuse.
>
> (2) ….

58. The effect of these provisions is that for all the penalties, there is a defence of 'reasonable excuse' (s 71). It amounts to a complete defence. In addition, but only for those more serious penalties involving misdeclarations, there is an additional ability to mitigate a penalty in an amount from 0% to 100% (s 70). The reasons for mitigation are open ended: Parliament only specifies what they cannot be.

59. For either kind of defence, Parliament specifies that insufficiency of funds is irrelevant (see s 70(4)(a) and s 71(1)(a)). Indeed it would be a nonsense for Parliament to allow something to amount to a defence under s 71 but not mitigation under s 70. Yet under s 70(4)(c) Parliament specifically excludes good faith as a ground for mitigation. Logically, this strongly suggests that Parliament did not intend it to be a defence under s 71 either; therefore the reason good faith was not specifically excluded as a defence in s 71 was that it was inherent in the test "reasonable excuse" that good faith is no defence. In other words, the test of "reasonable excuse" was intended in VAT to be objective and not subjective in nature. The question is not (just) whether the taxpayer acted honestly but whether he acted reasonably. Or perhaps more accurately the test is whether in failing to do as

the law required him to do the taxpayer acted as a reasonable (and honest) taxpayer would act. The taxpayer must (subjectively) be honest but to have a 'reasonable excuse' the cause of his failure to obey the law must have been something that would have justified a reasonable taxpayer in the same circumstances disobeying the law.

60. I also note that although permission to appeal has been granted in *Wake-Walker*, that does not necessarily mean that the Upper Tribunal considers that there is a reasonable prospect of the appellant proving, even in the direct tax context, that 'reasonable excuse' is a subjective test: it is an appeal against a finding that it was a subjective test so the grant of permission to appeal demonstrates only that the Upper Tribunal considers that there is a reasonable prospect of HMRC proving that it is an objective test.

61. In conclusion, I do not consider that the appellant has a reasonable prospect of showing that 'reasonable excuse' in s 71 VAT is a subjective test. Therefore, even if the appellant could prove that it did not know of the fraud, that would not be amount to a reasonable excuse for the misdeclaration (as it cannot put the case that it *ought* not to have known for reasons explained above).

62. I do not consider that there is therefore any point in staying the strike out application behind the Upper Tribunal decision in *Wake-Walker*. I consider that the appellant does not have a reasonable prospect of defending its penalty appeal on the grounds of 'no conncection to fraud' and/or 'no means of knowledge' as it will not be able to argue this matters as it would be an abuse of process to do so; moreover, it cannot argue no 'actual knowledge' as that is irrelevant as the test for reasonable excuse is objective.

Reasonable prospect of success?

63. If the appellant had put forward no other grounds of appeal in its penalty appeal other than that (1) there was no connection to fraud and/or (2) no knowledge or means of knowledge of the fraud and as the test for reasonable excuse is objective, I find it is clear that its appeal has no prospect of success as I have found that it would be an abuse of process to permit it to argue the matters that would have been in issue in the MTIC appeal.

64. But as I have already said, the appellant does put forward other grounds of appeal so I go on to consider whether there is a prospect of success for any one of those.

65. To recap, those grounds are:

(1) The assessment was void because it gave the wrong company registration number for the appellant company;

(2) The assessment is out of time;

(3) The assessment was in the wrong amount;

(4) Even if the appellant ought to have known of fraud in its supply chain, HMRC were in breach of its public law duty to protect traders from such fraud and that amounts to a reasonable excuse.

Public law ground

66. This ground (4) only really emerged in the hearing; it was not really apparent in the 16 page statement where the appellant's case appeared to be that the alleged breach of duty by HMRC to warn the appellant meant that the appellant had no means of knowing of the fraud. But in the hearing, Mr Shakeel made the submission that even if the appellant ought to have known of the fraud, it still had a reasonable excuse for its misdeclaration because of HMRC's alleged breach of duty.

67. HMRC did not object to Mr Shakeel making this submission late in the day; Mr Carey did say that it had no prospect of success as the Tribunal had no public law jurisdiction.

68. I reject that submission. It is clear that this Tribunal does have some jurisdiction to consider matters of public law, and, as I have recently said in the case of *Garrod* [2015] UKFTT 353 (TC) at §146, reasonable excuse is an area where it seems to me Parliament clearly intended public law matters to be taken into account. In any event, the matter is certainly not beyond argument and I would not strike out this ground of appeal as having no reasonable prospect of success on the basis it raises public law matters.

69. But even though I do not reject it on the basis it raises public law issues, that does not mean it has a reasonable prospect of success. I can, of course, only consider the question from the legal point of view; I heard no evidence and can make no findings whatsoever about whether the allegation that HMRC was in breach of a public law duty is well founded or not. So I just consider it from the stand point that if the appellant can prove a breach of public law duty by HMRC, would that in law amount to a reasonable excuse even though the Tribunal must assume that the appellant ought to have known of the fraud before it entered into the transaction?

70. And my conclusion is that as reasonable excuse is an objective test of whether the appellant behaved as an honest and reasonable taxpayer would behave in the same circumstances, and those circumstances were that the taxpayer had means of knowledge of the fraud, then such a reasonable taxpayer would not have entered into the transaction despite any public law duty failings by HMRC. The reasonable taxpayer with means of knowledge would have known of the fraud: it would not have entered into the transaction despite any failings by HMRC. So if a taxpayer in these circumstances did go ahead with the transaction, it was not acting as a reasonable taxpayer would have acted and therefore it would not have a reasonable excuse for the subsequent misdeclaration. So as a stand alone ground of appeal, the alleged breach of public law duty by HMRC has no prospect of success in law.

Wrong company registration number

71. This challenge is to the form of the assessment. The company registration number was incorrectly stated in the assessment. Mr Shakeel's case on this amounts to saying that the penalty assessment was void or voidable because it contained an erroneous company registration number.

72. The law on what amounts to an assessment was considered recently in *Queenspice* [2011] STC 1457 in the Upper Tribunal where Lord Pentland said:

> "[25]…(iii) in judging the validity of notification, the test is whether the relevant documents contain between them, in unambiguous and reasonably clear terms, a notification to the taxpayer containing (a) the taxpayer's name, (b) the amount of tax due, (c) the reason for the assessment, and (d) the period of time to which it relates.

73. I find that the assessment of 27 June clearly stated the taxpayer's name; it was clearly a notification to the taxpayer. It was sent to the right address. While it contained the wrong company registration number, there could be no doubt of the intended recipient as the name and address were correct. I do not consider that there is any reasonable prospect of success of arguing that the notification of the assessment was not to the taxpayer or did not include the taxpayer's name; therefore I do not consider that the appellant has a reasonable prospect of showing that the assessment was void or voidable.

Assessment in wrong amount?

74. It is accepted that the assessment was in the wrong amount. The appellant's case is that that makes the assessment void or voidable.

75. The reason the assessment was in the wrong amount was that it was charged on the input tax claims which the appellant made in four periods, 11/05, 03/06, 04/06 and 05/06. However, on review, HMRC came to the view that they should not have included an assessment for period 11/05 because under s 63(2) VATA a misdeclaration penalty can only be charged if the misdeclaration is at least £1,000,000 or 30% of the relevant amount for that period. For period 11/05, the misdeclaration did not meet these criteria and it was removed from the assessment. This reduced the assessment by £14,715.00 to £3,229,589.

76. Does this error make the assessment voidable? In *Pegasus Birds* [2004] EWCA Civ 1015, Carnwath LJ said:

> "Even if the process of assessment is found defective in some respect…the question remains whether the defect is so serious or fundamental that justice requires the whole assessment to be set aside, or whether justice can be done simply by correcting the amount to what the Tribunal finds to be a fair figure on the evidence before it."

77. That was in a case where the assessment was required to be to best judgment: that is not even a requirement for s 77(2) assessments. And s 77(9) appears to

expressly contemplate that an assessment can be reduced by HMRC without being withdrawn.

78. A case that an erroneously high assessment is necessarily void or voidable even to the extent it was validly made is in my view bound to fail. Mistakes are made; mistakes about the true amount owed does not make the assessment void or voidable.

79. Of course, to the extent that the assessment is excessive, the appellant would have a good ground of appeal in respect of the excess. However, HMRC corrected the error in its review decision. It stated the assessment would be reduced to £3,214,874.00 and this appeal is against that reviewed assessment. There is no need for the appellant to appeal against the excessive £14,715 in the original assessment for £3,229,589.00 because HMRC have (under S 83F(5)(b) VATA) already reviewed that decision and varied it to reduce it by £14,715.

80. So the assessment now stands at £3,214,874 and the appellant has not suggested that that figure is incorrectly calculated; its submission was that that assessment is entirely invalid because of the error which led to the assessment being overstated by some £14, 000. I have found that this submission does not have a reasonable prospect of success.

Assessment out of time?

81. Have HMRC demonstrated that the appellant has no reasonable prospect of showing that the assessment was out of time?

82. The assessment was made under s 63 VATA. The period of the assessment is set out in s 76(3)(d) and the time limit for such an assessment is contained in s 77(2) which provides, so far as relevant:

> "…an assessment under s 76 of an amount due by way of any penalty, interest, or surcharge referred to in subsection (3) of that section may be made at any time before the expiry of the period of 2 years beginning with the time when the amount of VAT due for the prescribed accounting period concerned has been <u>finally determined</u>" (my emphasis)

83. Mr Shakeel's case was that, at the very latest, the VAT due for the 3 periods in question was finally determined when the unless order was breached. The order was breached by 5 May 2012 (§5-6) but the assessment was not raised until 27 June 2014, which was more than two years later.

84. HMRC's position was that the VAT was not finally determined until permission to appeal the reinstatement application was finally refused. This was on 3 March 2014 (§9). The assessment on 27 June 2014 was well within 2 years of this date.

85. HMRC's fall back position was that, at the earliest, the VAT was finally determined when the Tribunal issued the Order striking out the appeal. That order

was dated 29 June (although the hearing had coincidentally taken place on 27 June) 2012. That was just within two years.

86. Does the appellant's case on this have a reasonable prospect of success?

87. If the date from which time should be measured is the date of the strike out then my view is that the appellant's case would have at the least a reasonable prospect of success. This is because Rule 8(1) provides:

> "The proceedings…will automatically be struck out if the appellant has failed to comply with a direction that stated that failure by a party to comply with the direction would lead to the striking out of the proceedings…"

88. Literally interpreted, and indeed interpreted in the way that the Tribunal interprets this in its day to day practice, is that a failure to comply with a Rule 8(1) unless order by the due date means that, without the Tribunal taking any further action, the proceedings are struck out the day after the due date for compliance. All the Tribunal does in such a case is send a letter notifying the appellant that its appeal has been automatically struck out and of the right to apply for reinstatement.

89. That procedure, for reasons unknown to me, was not followed in this case. In this case the Tribunal called a hearing at which Judge Khan appeared to exercise a discretion to strike out the appeal. But it seems to me that the appellant has a good case for arguing that the appeal had already been automatically struck out on 5 May and Judge Khan's order was to that extent a nullity. Ordinarily, it would not matter whether the appeal was struck out on 5 May or 29 June 2012: it was clearly struck out. But here the dates matter and the appellant has a good case that the strike out occurred on 5 May 2012.

90. However, having said that, does the appellant also have a good case that it is the date of the striking out which matters for measuring the two years? What does "finally determined" in s 77(2) VATA mean? There is no statutory definition. Applying a normal meaning to the phrase, it is clear that "finally" is meant to qualify "determined". So Parliament was not referring to something which merely determined the proceedings; it was referring to something which finally determined the proceedings.

91. It seems unarguable to me that Parliament clearly had in mind proceedings coming to a final end; it had in mind the end of any appeal process and, it necessarily follows, any reinstatement process. The strike out (whether it took place on 5 May or 29 June), while it 'determined' the proceedings, could not have been final until the time for a reinstatement application elapsed without such application being made, or if such application was made, until it was finally resolved. Final resolution in this appeal was when the appeal against the reinstatement refusal was finally determined in the Upper Tribunal on 3 March 2014.

92. I do not consider that the contrary is arguable. It is well understood that "finally determined" means that the determination is no longer subject to any further appeal

process; that must necessarily mean it is no longer possible to reverse the order by a reinstatement application. So I reject this as a ground of appeal with a reasonable prospect of success.

Suppliers accounted for VAT

93. I mention in passing that in his statement and at the hearing Mr Shakeel mentioned that the appellant could prove that his suppliers had accounted for the VAT which HMRC refused to repay to him.

94. This is a bad ground of appeal. HMRC no doubt accept that the appellant's immediate suppliers accounted for the VAT on the suppliers (at least by offset against their own input tax): but the appellant's entitlement to recover that tax does not rest on whether its suppliers accounted for it. It rests on whether the appellant's transactions were connected to fraud and whether it knew or should have known of that. When its appeal was struck out, its appeal against the assessment raised on the basis that it failed this test was dismissed. Even though the appellant may be able prove his suppliers accounted for VAT, and indeed I doubt it is in dispute, it would have made no difference to the outcome of the MTIC appeal and is similarly irrelevant to the penalty appeal.

95. There may be an issue in the expenses appeal about whether those suppliers accounted for VAT, but the grounds of the input tax denial are different in that appeal. The issue is irrelevant to the penalty appeal.

Any other grounds of appeal?

96. I take into account that the appellant is not legally represented but represented by its director. Is it apparent that it might have other grounds of appeal not put forward by the appellant's director?

97. I have noted that under s 70 VATA it can ask for mitigation of the penalty even up to 100%. The grounds on which it can do so are open ended. But, as with reasonable excuse, it would be an abuse of process to re-litigate what was already decided against it when its MTIC appeal was struck out. So it cannot make a submission that there was no fraud or if there was, it could not have known of it. In any event, such a submission would be that there was no misdeclaration and so does not fall within s 70 in any event as that section only applies where there is liability.

98. In so far as its submission is that it acted in good faith (in other words, its submission is that, even if it ought to have known of the fraud, in fact it did not), it is clear from s 70(4)(c) that good faith is not a ground on which the penalty can be mitigated.

99. While Mr Shakeel did not say in so many words that the appellant would have difficulty paying the penalty, even were this the case, it would not amount of a ground of appeal with any prospect of success. Difficulties in paying the penalty are irrelevant to mitigation (s 70(4)(a) VATA).

100. Mr Shakeel did complain that the penalty was very large. While Mr Shakeel did not claim the penalty was disproportionate in so many words, he did complain that in absolute terms the penalty at over £3 million is very large. So, lastly, I consider whether the appellant has a reasonable prospect of succeeding in a case that the penalty was unlawful as disproportionate.

An arguable case the penalty is disproportionate?

101. It is clear from *Total Technology (Engineering) Ltd* [2012] UKUT 418 (TCC) that a penalty regime could be disproportionate in itself or alternatively that even if the penalty regime is proportionate, the particular penalty imposed in its particular circumstances could be disproportionate ([73] and [78]).

102. What is meant by proportionality? This was discussed at length in *Total Technology*. It is clear that issues of proportionalty arise under EU law, the European Convention on Human Rights and national law. The concerns raised by each may not be identical but in general 'proportionality' means that there must be a 'reasonable relationship of proportionality between the means employed and the aim pursued' (*Lindsay* [2002] EWCA Civ 267 at [57]) and that a penalty to be struck down must not be 'merely harsh but plainly unfair' (*International Transport Roth GmbH* [2003] QB 728 at [26]); a penalty must not be excessive in the sense that it must not impose a disproportionate burden on a defaulting trader ([72] of *Total).*

103. Could the appellant have reasonable prospects in a case that the misdeclaration penalty regime itself is disproportionate? It is clearly legitimate for the UK government to seek to deter misdeclarations by imposing penalties for making them, but does the scheme of the penalty regime go beyond what is proportionate? There is a defence of reasonable excuse (s 71 VATA) and the possibility of mitigation (s 70 VATA) on any grounds bar those specifically excluded. Moreover, misdeclarations which are corrected by the taxpayer before HMRC discover them do not attract penalties: s 63(11).

104. If this is enough to mean that the regime itself is proportionate, is the £3 million penalty proportionate in the individual circumstances of the appellant's case? It was charged at 15% so the misdeclaration was of well over £25 million. In *Enersys Holdings UK Ltd* [2010] UKFTT 20 (TC), this Tribunal (Judge Bishopp) considered a penalty of some £130,000 was plainly unfair for a VAT return filed only a few hours late, although that was a case of 1 day late compliance. Different considerations will apply in circumstances where the taxpayer claimed on a VAT return £25 million more in a repayment than it was entitled to in circumstances where its 181 transactions (which must have had a value of about £142 million) were connected to fraud and it must be taken as having had the means of knowing that. But nevertheless I have to take account of the fact that the absolute amount of the penalty is very high.

105. In *Total Technology,* the Upper Tribunal said of the default penalty regime at [93]*:*

> "*There is no maximum penalty*. This, we think, is a real flaw at both the level of the regime viewed as a whole and potentially at the individual level of a taxpayer with a very large payment obligation. In *Enersys*, Judge Bishopp considered it unimaginable that a tribunal imposing a penalty would do so in an amount as much as £130,000 for the sort of error in that case….any approach to the analysis must pay due regard to the principle that the absolute amount of the penalty must be proportionate in the context of the aim pursued and in the context of the objectives of the Directive. We agree therefore that there must be some upper limit, although it is not sensible for us in the present case to suggest where that might be…"

106. And then in its conclusion on the default surcharge regime it said at [100]:

> "Our conclusion, therefore, is that with the possible omission of an upper limit on the penalty which may be imposed, the regime viewd as a whole does not suffer from any flaw which renders it non-compliant with the principle of proportionality in the sense that it, or some aspect of it, falls to be struck down."

107. While this was said in the context of a late payment penalty, it is at least arguable that the same reasoning ought to apply in the context of a misdeclaration penalty. And then, while the Upper Tribunal does not discuss what would be the ceiling for a default surcharge, let alone a misdeclaration penalty, it must be at least arguable that a penalty of £3 million is in breach of it.

108. The above comments may not be strictly binding on this Tribunal as it seems arguable that they were only comments in passing and not essential to the decision they reached ('obiter dicta') but nevertheless, their comments must be recorded respect so I have to conclude that, in view of these comments by the Upper Tribunal, the appellant has at least a reasonable prospect in putting a case that a £3 million penalty was disproportionate.

109. More recently, the Upper Tribunal has released its decision in *Trinity Mirror* [2015] UKUT 0421 (TCC). Here the Upper Tribunal stated it was not appropriate for a Tribunal to attempt to state what an upper ceiling for a penalty should be (see [62]) but at [66] stated that 'the absence of any financial limit on the level of surcharge may result in an individual case in a penalty that might be considered disproportionate…'. This does nothing to alter my view that the appellant has at least a reasonable prospect of success in putting a case that a £3 million penalty was disproportionate.

Conclusions

110. I have considered the appellant's grounds of appeal and concluded that as the test for reasonable excuse is objective, the appellant has put forward no grounds of appeal with a reasonable prospect of success: in so far as his case relies on stating that there was no fraud and/or the appellant did not have the means of knowledge of it, it is an abuse of process to put this case. It cannot do so and therefore this ground has no prospect of success. In so far as the appellant's case relies on the four matters

outlined at §20, I have concluded that these also have no reasonable prospect of success.

111. However, I have concluded that the appellant, in view of what was said in *Total Technology* and *Trinity Mirror*, has a reasonable prospect of success in a case that the £3 million penalty was disproportionate. Rule 8(3) gives me power to strike out a part of the appellant's case where I consider that there is no reasonable prospect of a part of it succeeding. So I strike out all the grounds of appeal as outlined above, other than I permit the case to continue on the one remaining ground which is a case that a £3 million penalty is disproportionate. I take no view on whether or not that case will or will not succeed: merely that it is arguable.

112. However, in permitting that ground of appeal to go forward, the appellant is not allowed to abuse the process of the court. It is not allowed to put a case that either there was no fraud in some or all of the supply chains concerned or that it did not have means of knowledge of that fraud.

Directions in the penalty appeal

113. It is clear from what I have said at §61 that the question of knowledge of the fraud is irrelevant to liability for a misdeclaration penalty. But does it also follow that the question of knowledge is also irrelevant to the question of whether a misdeclaration penalty is disproportionate? For instance, could a Tribunal decide, applying the dicta from *Total Technology* that a £3 million misdeclaration penalty was disproportionate if the misdeclaration was innocent, but not if the misdeclaration was knowing?

114. However, permitting the appellant to argue knowledge in the penalty appeal will convert a hearing on a fairly short point of law (proportionality) into a hearing of several weeks to hear the evidence on knowledge (which necessarily would require the tribunal not only to hear the 'knowledge' evidence but also the 'means of knowledge evidence' (as means of knowledge can be evidence of knowledge) and also the evidence of connection to fraud (as evidence of connection to orchestrated fraud can be evidence of knowledge of the fraud). To put either side to the expense of this when it is by no means certain it would be relevant is wasteful.

115. So I direct a <u>preliminary</u> hearing on the question of whether the penalty levied in this appeal is disproportionate. That preliminary hearing will consider the relevant facts other than, for the reasons given in the immediately preceding paragraph, the question of whether the appellant had knowledge of the fraud. It will also not consider any issue of fact on which it would be abusive, for the reasons explained earlier, for the appellant to put a case (in other words the appellant will be unable to put the case that (a) there was no fraud in the supply chains and/or (b) the appellant had no means of knowledge of the fraud). Such a hearing has the potential to resolve the appeal one way or the other without a further hearing being necessary. However, if the Tribunal hearing that appeal determines the preliminary point in such a way that the question of proportionality of the penalty depends on the question of fact of the appellant's <u>knowledge</u> then a further hearing will have to take place to determine this.

116. The parties will shortly be issued with directions to take to hearing this preliminary point solely on the question of whether the penalty in this appeal is, subject to the question of actual knowledge, disproportionate as a matter of law. To avoid abuse of process, it must assume that there was fraud in the supply chain and that the appellant had the means of knowledge of it.

Application for a stay

117. As I have not struck out the entire appeal against the penalty, I have to consider the appellant's application to stay its expenses appeal behind the penalty appeal. The reason for the application was, as Mr Shakeel explained, that as the amount of the penalty appeal dwarfed the amount in dispute in the expenses appeal, so he would rather leave the expenses appeal until the penalty appeal was resolved.

118. While I can understand this reasoning, the overriding objective of the Tribunal is justice to all parties; and that requires avoiding unnecessary delay in resolution of disputes. No purpose consonant with justice would be served by staying the expenses appeal: it is a stand alone matter from the penalty appeal. There appears to be no overlap in disputed facts. Liability in one does not affect entitlement in the other. Both appeals must be heard; resolution of the penalty appeal either way would not resolve the expenses appeal.

119. The test for whether an appeal should be stayed is set out in *RBS Deutschland* and is whether the resolution of the lead appeal would be of material assistance to the appeal in question and that it is expedient for justice for there to be a stay. The lack of relationship between the legal and factual issues in the two appeals would have meant that resolution of the penalty appeal would not be of material assistance to resolution of the expenses appeal. The question is not whether it would be materially convenient to one or other of the parties to stay an appeal.

120. So while it might be convenient to the appellant to stay the expenses appeal, I do not consider that it would be in the interests of justice to do so. It would delay resolution of the expenses appeal for no good reason. Indeed, bearing in mind that the facts at issue in the expenses appeal date back to 2005/6 it is all the more important that it should be heard as soon as possible. The tax is already a decade old. The expenses appeal must proceed to hearing without any stay.

Footnote – appellant's sick note

121. In the appellant's bundle produced to HMRC the day before the hearing and to the Tribunal on the day of the hearing was a sick note. It was dated 23 July 2015 and stated Mr Shakeel would not be fit for work due to "Depression NOS" from that date to 6 August 2015.

122. Mr Shakeel, at the outset of the hearing, stated that he did not ask for a postponement of the hearing but had produced the sick note to explain, he said, why he had been leaving dealing with matters to do with the appeal to the last minute. Whether or not this sick note, and Mr Shakeel's explanation, excused his failure to

comply with Judge Raghavan's order was not a matter I considered as Judge Raghavan had not made an Unless order and HMRC took no point on late compliance. Mr Shakeel said to the Tribunal that he understood he could not rely on the sick note to challenge any decision made by this Tribunal following the hearing.

123. Nor did I consider a postponement appropriate even without the appellant's application. The hearing had been postponed once before. There was no doctor's statement that Mr Shakeel was unable to attend today's hearing. He appeared fit to do so, and had prepared a long statement for it the day before. And from what Mr Shakeel said, this was a long-term health issue and in my view long–term ill-health was unlikely to justify postponement of hearings as that would lead to an indefinite delay in justice.

Application for permission to appeal

124. 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: 13 AUGUST 2015