[2019] UKFTT 596 (TC)

TC07379

PROCEDURE – application for preliminary issue – Wrottesley *considered – succinct, knockout point but lacked reasonable prospect of success – application refused*

FIRST-TIER TRIBUNAL
TAX CHAMBER

Appeal number: TC/2017/06671

BETWEEN

COAST TELECOM LTD **Appellant**

-and-

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

TRIBUNAL: JUDGE BARBARA MOSEDALE

Sitting in public at Taylor House, London on 3 September 2019

Mr M Firth, Counsel, instructed by Morgan Rose Solicitors, for the Appellant

Mr H Watkinson, counsel, instructed by the General Counsel and Solicitor to HM Revenue and Customs, for the Respondents

DECISION

INTRODUCTION

1. On 14 June 2017, HMRC made a decision which they are now treating as an assessment on the appellant to recover input tax which the appellant had deducted on their VAT returns relating to periods on and after 8/14. That decision is under appeal. This application is an application by the appellant for the Tribunal to determine a point of law as a preliminary issue in that appeal.

2. The background to the appeal is that it appears accepted by all parties that in the relevant periods the appellant had acquired mobile phones by purchase from traders based in other EU member States and then sold them either to a UK-based customer or to trader based in another EU member State. And in respect of these mobile phones sales, the appellant's VAT returns effectively returned a nil VAT liability.

3. The appellant would not have been expected to account for VAT on the sales of the phones because the sale was (if cross-border) ordinarily zero rated and (if within the UK) ordinarily caught by the UK's reverse charge regime. Moreover, ordinarily a taxpayer acquiring cross-border taxable goods for resale would not expect to pay VAT on the purchase: such a trader would be obliged to charge itself acquisition VAT on the acquisition of the phones but would off-set in its VAT books the same amount as input tax incurred on the taxable (albeit zero rated) sale. And this was how the appellant calculated its liability to VAT as nil.

4. HMRC did not accept that the ordinary position prevailed in this case; they considered that the transactions in question were connected to fraud and the appellant knew or ought to have known that. They considered that the doctrine in *Kittel* (2006) C-439/04 applied such that the appellant was correctly denied its input tax deduction, such that it should have accounted to HMRC for the acquisition VAT.

5. The appellant raised a number of grounds of appeal, including that it denied the connection to fraud and that if it was wrong on that, it denied that it knew or should have known of it. There were other grounds of appeal as well, including a technical one relating to the original decision letter, and whether the assessment was timely. I was not concerned with any of those grounds in this hearing. I was concerned with the appellant's case that, properly understood, *Kittel* meant that, where there was a connection to fraud of which the taxpayer knew or ought to have known, the taxpayer was not obliged to account for acquisition VAT any more than it was entitled to recover its input tax. The appellant applied for that ground of appeal to be tried as a preliminary issue and HMRC opposed the application.

THE APPLICABLE LAW

6. I did not understand the parties to be in dispute over the applicable law to the question of whether or not to order a preliminary issue hearing. The leading authority is *Wrottesley* [2015] UKUT 637 (TCC) although I was also referred to cases considered by the Upper Tribunal when giving their guidance in that case, and to another, later, case which cited it with approval.

7. My approach is to set out the *Wrottesley* guidance and then deal with the parties' submissions in respect of each of the matters which the Upper Tribunal said should be considered. That guidance was contained at [28] and was as follows:

> We think that the key principles to consider can be summarised as follows:
>
> (1) The matter should be approached on the basis that the power to deal with matters separately at a preliminary hearing should be exercised with caution and used sparingly.

(2) The power should only be exercised where there is a "succinct, knockout point" which will dispose of the case or an aspect of the case. In this context an aspect of the case would normally mean a separate issue rather than a point which is a step in the analysis in arriving at a conclusion on a single issue. In addition, if there is a risk that determination of the preliminary issue may prove to be irrelevant then the point is unlikely to be a "knockout" one.

(3) An aspect of the requirement that the point must be a succinct one is that it must be capable of being decided after a relatively short hearing (as compared to the rest of the case) and without significant delay. This is unlikely if (a) the issue cannot be entirely divorced from the evidence and submissions relevant to the rest of the case, or (b) if a substantial body of evidence will require to be considered. This point explains why preliminary questions will usually be points of law. The tribunal should be particularly cautious on matters of mixed fact and law.

(4) Regard should be had to whether there is any risk that determination of the preliminary issue could hinder the tribunal in arriving at a just result at a subsequent hearing of the remainder of the case. This is clearly more likely if the issues overlap in some way- (3)(a) above.

(5) Account should be taken of any potential for overall delay, making allowance for the possibility of a separate appeal on the preliminary issue.

(6) The possibility that determination of the preliminary issue may result in there being no need for a further hearing should be considered.

(7) Consideration should be given to whether determination of the preliminary issue would significantly cut down the cost and time required for pre-trial preparation or for the trial itself, or whether it could in fact increase costs overall.

(8) The tribunal should at all times have in mind the overall objective of the tribunal rules, namely to enable the tribunal to deal with cases fairly and justly.

APPLICATION OF THE LAW TO THE CIRCUMSTANCES OF THIS CASE

(1) Exercise caution and use sparingly

8. I was referred to Hildyard J's decision in *Wentworth Sons Sub-Debt SARL v Lomas and others* [2017] EWHC 3158 where he had cited *Wrottesley* with approval and said, at [36]:

> …caution may be the tie-breaker.

My understanding of the authorities is that in cases of doubt whether to order a preliminary issue, the tribunal should err on side of caution and probably refuse to do so.

(2) Succinct, knockout point and (6) no further hearing required

9. The Upper Tribunal meant what it said: there is no point to a preliminary issue hearing unless the subject of it is a short, self-contained point that, if resolved in favour of one of the parties, will resolve the proceedings.

10. Mr Watkinson originally questioned whether the proposed preliminary issue was such a succinct, knockout point but withdraw this objection. And I agree with Mr Firth that the proposed preliminary issue is such a point.

11. It is succinct. It is a pure point of law. No evidence needs to be heard as the point arises on the assumption that HMRC can prove every factual allegation that they make; in particular, it arises on the assumption that HMRC can prove connection to fraud and knowledge or means of knowledge of that connection on the part of the appellant.

12. It is also a knock-out point. If the appellant is right, then the appellant will win its appeal even if HMRC can prove all the factual allegations which it makes. HMRC would lose the appeal even if all the matters left outstanding until the substantive hearing were resolved in their favour, so if the appellant is right on the proposed preliminary issue, a further hearing would be pointless and could be dispensed with.

(3) Requires relatively short hearing

13. And, as a point of pure law, it is a relatively short one. There are only a few senior authorities that would need to be considered (*Mobilx* and *Butt* in the Court of Appeal and a few CJEU authorities, of which the most important is *Kittel.)* I accept Mr Firth is likely to be right in estimating it would require no more than a day; I would not be surprised if it required only half a day. In fact, counsel largely covered the arguments that they would make in the preliminary issue hearing in today's hearing with me and that hearing in its entirety took only about an hour and a half.

14. This is a point very much in favour of a preliminary issue: as Mr Firth pointed out, the warning against preliminary issue hearings given by the House of Lords in the leading case of *Tilling v Whiteman* [1980] AC1 would not appear to apply here:

> …If [the practice of allowing preliminary points to be taken] cannot be confined to cases where the facts are complicated and the legal issue short and easily decided, cases outside this guiding principle should at least be exceptional.

Here the facts to be decided in the substantive hearing are complicated and the legal issue proposed for the preliminary hearing short and easily decided.

(7) potential for saving of time and costs

15. I have already agreed with Mr Firth that the proposed preliminary issue hearing would be short and would not require any exchange of evidence. And Mr Watkinson did not dissent from Mr Firth's suggestion that the substantive hearing would be likely to take two weeks and would require significant exchange of evidence.

16. The proposed hearing has, therefore, the potential for significant savings.

(4) Should not prejudice substantive hearing

17. HMRC did not suggest that the proposed preliminary issue hearing would prejudice the substantive hearing (other than delaying it which I deal with below). I consider that it would not prejudice the substantive hearing: resolving the preliminary issue would not mean making decisions on facts or indeed on any matter which would make it difficult to proceed with the substantive hearing.

(5) The risk of delay

18. HMRC's main concern was with delay. The appeal relates to events which took place in 2014-2015 and as time passes, there is a real risk of evidence becoming stale. While Mr Firth pointed out that, were it not for HMRC's objection, today's hearing could have been used to resolve the preliminary issue, Mr Watkinson's concern was that any FTT decision on the matter would not be the end of the matter: an appeal was very likely.

19. I agreed with Mr Watkinson over this. If the appellant lost the preliminary issue, and did not appeal the decision, nothing would have saved and time and costs would have been wasted;

if the appellant did appeal it, the substantive hearing would be further delayed. If, on the other hand, HMRC lost the preliminary issue, Mr Watkinson said that it was very likely that HMRC would appeal. It would be a significant matter of policy to them as it would mean it would be difficult if not impossible for HMRC to take action against persons knowingly participating in MTIC fraud where the intended victim was another Member State's tax authority.

20. Of course, the sort of MTIC fraud most commonly alleged in this Tribunal was a fraud on HMRC itself and the defaulting trader and buffer traders issued VAT invoices: they could be denied their input tax under *Kittel* but would remain liable to account for output tax under Sch 11 para 5 VATA even if not on any other grounds.

21. However, the fraud alleged here was a fraud on the Polish VAT authorities and the alleged UK participator did not issue any VAT invoices: it was only liable to account for acquisition VAT if it made a taxable acquisition and the appellant's case was that, if *Kittel* applied, it did not make a taxable acquisition. Sch 11 para 5 did not apply as no VAT invoice was issued by the appellant.

22. So it was a point of principle in so far as HMRC considered a UK trader was facilitating MTIC fraud in other member states. If they lost on it, I considered it very likely to lead to appeal, and, moreover, if a higher court was in any doubt of the matter, it was the sort of important legal point likely to be referred to the CJEU (subject of course to Brexit). So, at least if HMRC were unsuccessful in the lower courts on the point, I would expect the appeal process to take years.

(8) fairness and justice

23. There are three particular matters I will consider under this heading, and then I will reach my conclusion on what is the fairest thing to do in these particular circumstances.

HMRC has already served its evidence

24. Mr Watkinson alleged that the application was a delaying tactic by the appellant; they had, he said, waited until after HMRC had served its evidence before making the formal application to the Tribunal.

25. I accepted Mr Firth's position that that was not what had happened; the appellant had suggested the preliminary issue to HMRC before the due date for compliance by HMRC with their obligation to serve evidence. HMRC could have responded by asking for an extension of time on the service of evidence if it wanted time to consider the application. They did not; they did not even understand the application and told the appellant so. This led to some correspondence and then a formal application to the Tribunal which so happened to be after HMRC had served its evidence.

26. I do not consider this a factor which should count against the application.

Impact of delay on HMRC

27. I asked in the hearing whether the parties considered it relevant that the appellant was applying for the preliminary issue hearing yet any delay was likely to adversely affect HMRC more than the appellant because HMRC bore the burden of proving its case in this appeal; therefore, stale evidence was more of a problem for HMRC than for the appellant.

28. Who bears the burden of proof was not a factor specifically mentioned in *Wrottesley* but the Upper Tribunal did require the Tribunal to consider overall fairness and justice and so I do think it appropriate to take it into account. I think it is a relevant, albeit far from conclusive, factor that any delay in resolving the factual dispute in an appeal is more likely to affect the party opposed to the preliminary issue than the party promoting it. It is a small but relevant factor which counts against the application.

The chances of success

29. The Upper Tribunal in *Wrottesley* did not mention the merits of the proposed preliminary issue as something the Tribunal should consider; Mr Firth suggested that therefore I should not consider them at all.

30. Mr Watkinson referred me to Judge Raghavan's decision in *Milltown Ltd and another* [2016] UKFTT 640 (TC) where at [40] he said:

> …I also agree…that it is appropriate to have an eye to the likelihood of success on the preliminary issues put forward; the stronger an applicant's case on the preliminary points the greater the likelihood of economy in the disposal of the matter.

31. So, who is right? Should I consider the merits of the proposed preliminary issue when deciding whether to order a hearing of it?

32. Taking what was said in *Wrottesley* in isolation, I would say that while *Wrottesley* did not specifically mention the merits in its summary of what the FTT should consider, it did require the Tribunal to conduct a weighing exercise between the value of the preliminary issue potentially saving time and costs, and the risk of a preliminary issue hearing actually adding to the time and costs of the litigation. And as, to state the obvious, having a hearing to consider a preliminary issue without merit would have virtually no prospect of saving time and costs and be extremely likely to add to the time and costs of the litigation (and vice versa), it would therefore seem implicit in *Wrottesley* that the merits ought to be considered.

33. But looking at the matter more generally, there have been recent Upper Tribunal statements on when a Tribunal should consider merits in interlocutory matters. I consider the *Martland* [2018] UKUT 178 (TCC) decision first, as it was the earliest I was referred to, although it was not strictly an interlocutory matter: the proceedings concerned a substantive application by a taxpayer to be allowed to make a late appeal.

34. In that case the Upper Tribunal said:

> … the FTT can have regard to any obvious strength or weakness of the applicant's case; this goes to the question of prejudice – there is obviously much greater prejudice for an applicant to lose the opportunity of putting forward a really strong case than a very weak one. It is important however that this should not descend into a detailed analysis of the underlying merits of the appeal. In *Hysaj*, Moore-Bick LJ said this at [46]:
>
> > "If applications for extensions of time are allowed to develop into disputes about the merits of the substantive appeal, they will occupy a great deal of time and lead to the parties' incurring substantial costs. In most cases the merits of the appeal will have little to do with whether it is appropriate to grant an extension of time. Only in those cases where the court can see without much investigation that the grounds of appeal are either very strong or very weak will the merits have a significant part to play when it comes to balancing the various factors that have to be considered at stage three of the process. In most cases the court should decline to embark on an investigation of the merits and firmly discourage argument directed to them."
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> *Hysaj* was in fact three cases, all concerned with compliance with time limits laid down by rules of the court in the context of existing proceedings. It was therefore different in an important respect from the present appeal, which concerns an application for permission to notify an appeal out of time – permission which, if granted, founds the very jurisdiction of the FTT to consider the appeal (see [18] above). It is clear that if an applicant's appeal is

> hopeless in any event, then it would not be in the interests of justice for permission to be granted so that the FTT's time is then wasted on an appeal which is doomed to fail. However, that is rarely the case. More often, the appeal will have some merit. Where that is the case, it is important that the FTT at least considers in outline the arguments which the applicant wishes to put forward and the respondents' reply to them. This is not so that it can carry out a detailed evaluation of the case, but so that it can form a general impression of its strength or weakness to weigh in the balance. To that limited extent, an applicant should be afforded the opportunity to persuade the FTT that the merits of the appeal are on the face of it overwhelmingly in his/her favour and the respondents the corresponding opportunity to point out the weakness of the applicant's case. In considering this point, the FTT should be very wary of taking into account evidence which is in dispute and should not do so unless there are exceptional circumstances.

35. In the more recent decision in *Chappell* [2019] UKUT 209 (TCC) the Upper Tribunal distinguished *Martland* on the same grounds as the Upper Tribunal in *Martland* had distinguished itself from *Hysaj: Hysaj* and *Chappell* were interlocutory decisions within existing proceedings whereas *Martland* concerned a decision on a substantive application which was the subject of the proceedings. The Upper Tribunal in *Chappell* said this:

> [86] In my view when considering a reinstatement application which is made following the making of an unless order, the Upper Tribunal should, consistently with what was said by the Supreme Court in *Global Torch*, generally take no account of the strength of the applicant's case. It is helpful to set out in more detail what Lord Neuburger said at [29] of the judgment in that case:
>
> > "In my view, the strength of a party's case on the ultimate merits of the proceedings is generally irrelevant when it comes to case management issues of the sort which were the subject of the decisions of Vos, Norris and Mann JJ in these proceedings. The one possible exception could be where a party has a case whose strength would entitle him to summary judgment…."

36. While I am not so sure that, read as a whole, and bearing in mind it relied on *Hysaj,* that *Martland* was actually saying anything very different to what was said in that case or in the later decision of *Global Torch,* it does not really matter in these proceedings which are interlocutory proceedings and therefore should clearly follow the *Chappell* and *Global Torch* line of authority.

37. And that line of authority is that the FTT should not in interlocutory proceedings conduct a mini-trial; and the merits should only influence the outcome where they are very clear, one way or another. But where there is such clarity, I consider that the merits are relevant to an application for a preliminary issue.

38. I am slightly reluctant to consider whether the proposed preliminary issue has 'no reasonable prospect of success' as that is a ground on which HMRC would be entitled (in effect) to summary judgement in this Tribunal; HMRC is making no such application for summary judgment on the proposed preliminary issue. To do so would be to fly in the face of their opposition to the proposed preliminary hearing.

39. However, I do accept that the merits of the preliminary issue are not really to be weighed in the balance in these proceedings unless the merits are easily observed to have either the strength or weakness that borders on 'no reasonable prospect of success/failure' or what would entitle one or other party to summary judgment in the courts. This makes sense as the Tribunal cannot and should not conduct a mini-hearing in interlocutory hearings, as the parties are not

prepared and the Tribunal does not have the time, while at the same time it would be against justice to ignore a very obvious and clear weakness or strength in the case concerned.

40. So, to be clear, there is no application to strike out the ground of appeal proposed as a preliminary issue and even if there were, and even if the Tribunal did consider the ground to have no reasonable prospect of success, the Tribunal would not exercise its discretion to strike out, as that would be to pre-empt the decision on whether to hold a preliminary hearing.

41. But I will consider Mr Watkinson's case that the proposed preliminary issue was one which has no reasonable prospect of success in the context of *Wrottesley* criteria, which requires me to carry out a risk/benefit analysis.

No reasonable prospect of success?

42. The appellant's proposed preliminary issue is to determine whether the appellant is actually liable for acquisition tax on the mobile phone transactions if HMRC can prove those transactions were connected to fraud and the appellant knew or should have known it. The appellant says that they are not so liable as, if HMRC could prove that, it would mean that as a matter of law the transaction would not be an economic activity and/or the appellant would not be a taxable person acting as such.

43. It is perhaps worth saying, although I have already mentioned this, that the issue that the appellant raises would not normally be raised in an MTIC appeal. This is because HMRC in the past have normally only denied input tax to the (alleged) broker in an (alleged) MTIC chain. The broker has no output tax and so the question of whether its purchase is a valid transaction is not relevant; proceedings rarely concern (alleged) defaulters and buffers, but even were they to do so, the question of whether the transactions of the defaulter and buffers were economic activities is also unlikely to arise as the defaulter and buffers typically issue invoices: they owe the output tax either because the transactions were economic activities or because of Sch 11 Para 5 VAT which makes the VAT charged on an invalid invoice a debt to the Crown.

44. That is not the case here where the appellant would not have issued a VAT invoice in respect of the acquisition VAT that HMRC are seeking from the appellant by denying it the right to recover it as input tax.

45. So the question the appellant raises does not normally arise in MTIC appeals and so the appellant would say it is an arguable point. And further in support of the appellant's position, at [53] of *Kittel* the CJEU did say that

> ….the objective criteria which form the basis of the concepts of 'supply of goods effected by a taxable person acting as such' and 'economic activity' are not met where the tax is evaded by the taxable person himself

That comment has been repeated in later cases such as *Bonik* C-285/11. However, that comment on its face is restricted to a proved allegation that tax was evaded by the taxable person himself. But there is no such allegation in this case; the allegation in this appeal is that the appellant knew (or should have known) that its transactions were *connected* to fraud. The Court of Appeal in *Citibank* [2017] EWCA 1416 (TCC) said that that was not an allegation of fraud: [114]. And the CJEU in *Kittel* said of such a situation:

> [59] Therefore, it is for the referring court to refuse entitled to the right to deduct where it is ascertained, having regard to objective factors, that the taxable person knew or should have known that, by his purchase, he was participating in a transaction connected with fraudulent evasion of VAT, and to do so even where the transaction in question meets the objective criteria which form the basis of the concepts of 'supply of goods effected by a taxpayer person acting as such' and 'economic activity'.

46. In other words, the transactions are within the scope of VAT but the taxpayer who had actual or constructive knowledge his transactions were connected to fraud does not have the right to deduct input tax.

47. So, as neither the appellant nor HMRC suggest that the transactions at issue in the appeal involved tax being evaded by the appellant itself, and, as I understand it, there is no suggestion that the transactions did not take place or that the phones did not exist, there appear to be no reasonable prospect of the appellant persuading the Tribunal that the transactions were not economic activities or the appellant not a taxable person acting as such within the meaning of the Directive. Therefore, while the appellant is at risk of losing its input tax, there seem no grounds in law for its suggestion it is not liable for the acquisition tax.

48. Indeed, it is well-known that the context in which the CJEU gave its decision in *Kittel* was one where in the earlier case of *Optigen* (2006) C-354/03 HMRC had been urging the Court to rule that all the transactions in an MTIC chain were outside the scope of VAT irrespective of the traders' state of knowledge: the CJEU emphatically refused to adopt that approach.

49. I understood Mr Firth to rely heavily on the interpretation which Rose LJ in *Butt* [2019] EWCA Civ 554 gave to *Kittel* and the Court of Appeal's earlier interpretation of that in *Mobilx* [2010] EWCA Civ 517. She also considered the relationship to the MTIC cases of the *Halifax* (2006) C-255/02 abuse of rights doctrine which led to recharacterization of transactions.

50. The case *Butt* concerned the legality of a dishonesty penalty imposed on a director of a company denied its input tax because its transactions were to its knowledge connected to fraud. Unlike this case, an allegation of dishonesty was made (and proved). The only question considered by the Court of Appeal was whether the penalty was lawful; it was suggested the loss of entitlement to input tax was not a part of UK law so fraudulent conduct which led to such a loss of entitlement could not be penalised.

51. The Court of Appeal rejected the appellant's case in *Butt*. In the course of doing so, Rose LJ referred to [30] of *Mobilx* where the Court had explained that the effect of *Kittel* was that the transactions remained effective for VAT purposes but a trader with the relevant actual or constructive knowledge failed to meet the objective criteria for deduction of input tax. Moreover, she considered the CJEU decisions in *Italmoda* and *Cussens* and concluded at [39] that

> …Those cases [*Kittel, Italmoda*, and *Cussens*] establish that the fact that the taxpayer fraudulently carried out the transactions in respect of which the VAT credit is claimed does not mean that those transactions are not 'economic activity' or that he is not a 'taxable person acting as such'…..

She went on to say at [42] that the objective criterial for deduction were not met because the right to deduct was being exercised fraudulently.

52. It seems to me that *Butt* may recognise that *Italmoda* and *Cussens* represented a development of EU law beyond *Kittel* in that they seem to suggest that, even where the taxpayer is fraudulent, nevertheless in some cases there is still economic activity and the taxpayer remains a taxable person acting as such: it is merely the right to deduct tax for which the taxpayer no longer meets the objective criteria. But, as I have said, this appears irrelevant in this case where fraud is neither alleged nor admitted. So it may be that the effect of the CJEU cases considered in *Butt* that even where there is fraud on the part of the taxpayer, the transactions remain economic activity unless in fact the transactions did not actually take place because the goods did not exist. But that allegation is not made here.

53. As this is not a case where fraud is alleged against the appellant, however, the appellant's case that (if HMRC succeed on the facts) the transactions in issue were not within the scope of VAT would seem to have no reasonable prospect of success: the cases are clear that the transactions are within the scope of VAT but the trader with actual or constructive knowledge loses the right to deduct the input tax.

54. I would also make the point that, putting aside the authority, courts will try to give effect to intention of the legislators; one of the intentions of legislators was to make it more difficult to carry out frauds (see Kitttel [58]) so an interpretation that gives carte blanche to commit fraud is unlikely to find favour with any court or Tribunal, particularly when such an interpretation would fly in face of what CEJU and Court of Appeal have already said on this.

55. As I have said, HMRC did not understand the appellant's case on this and therefore would not consider in correspondence the application for a preliminary issue. I can understand why they had difficulties in following the appellant's case on this, as I had similar difficulties.

CONCLUSION

56. I accept that the proposed preliminary issue meets many of the *Wrottesley* criteria; it's a short, succinct knock-out point with (assuming it had merit) potential to avoid the time and expense of a 2 week fact-based hearing. But I refuse the application for it.

57. This is for two reasons. The appellant wants the preliminary issue, but, unless they fail at the early stages and give up, the inevitable delay to the substantive hearing is likely to be of some years due to the likelihood of appeal by HMRC if they lose on the point, and the delay is prejudicial both to HMRC as they have the burden of proof and to the good administration of justice as it presents a serious risk of evidence going stale.

58. Nevertheless, because of the potential significant costs saving of the preliminary issue I would have found the balance between the possible saving and the risk of delay and additional costs a difficult one. I think point (1) of the *Wrottesley* criteria operates as a tie breaker: so, in cases of doubt the Tribunal should err on the side of caution and I would refuse the application.

59. However, the second reason for refusing the application puts the matter beyond any doubt in my mind and I do not need to rely on the tie-breaker. And that is that I consider the legal point proposed as a preliminary issue to be so weak for the reasons given above that it is without, or is verging on being without, reasonable prospect of success.

60. I want to emphasise that I am not deciding the proposed preliminary issue; I cannot do so at this point and do not do so. I also want to make it clear that I am not suggesting that the ground of appeal should be struck out. It is often not appropriate to strike out weak grounds of appeal where there are other, better grounds of appeal: satellite litigation should be avoided as it adds to delay and costs. Striking out the proposed preliminary issue as a ground of appeal would be the same as holding a preliminary issue on the matter and give rise to all the problems of satellite litigation that I have identified.

61. But, when its weakness is taken into account, the potential for the preliminary issue to save time and costs in this appeal is very low, and the risk that calling a preliminary hearing will significantly delay and increase the cost of the resolution of the appeal, not to mention the risk of it making the evidence go stale, is seen to be very high. The balance is against hearing the proposed preliminary issue as a preliminary issue: it remains as a ground of appeal to be determined as part of the substantive hearing.

62. The application for a preliminary hearing is refused.

DIRECTIONS

63. The appellant asked for three months to serve its evidence from the date of this decision; Mr Firth accepted that the appellant has not been working on preparing its evidence while its application for a preliminary issue was determined; that risked incurring expense that might prove to be unnecessary.

64. I did not understand HMRC to object to this application for more time and the reality is that the appellant will need time to prepare its evidence. I therefore direct that not later than 3 months after the date of the release of this decision, the appellant must comply with direction 4 of the directions dated 16 November 2018.

RIGHT TO APPLY FOR PERMISSION TO APPEAL

65. 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: 20 SEPTEMBER 2019