[2021] UKFTT 0332 (TC)

# TC08266

*PROCEDURE – application for order to comply with Fairford Directions in MTIC appeals after repeated failures – application granted with Directions – cross-application for Disclosure – burden of proof in* Kittel *test – rule 27(2) of the Tribunal Rules confirmed – application refused*

**Appeal number: TC/2018/02788/V**
**TC/2018/04649/V**

**FIRST-TIER TRIBUNAL**
**TAX CHAMBER**

**BETWEEN**

**GREENCYC LIMITED** **Appellant**

**-and-**

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

**TRIBUNAL: JUDGE HEIDI POON**

**The hearing took place on the Tribunal's Video Platform on 8 December 2020.**

With the consent of the parties, the form of the hearing was V (video) on Tribunal video platform. A face to face hearing was not held because of the restrictions during the pandemic.

Prior notice of the hearing had been published on the gov.uk website, with information about how representatives of the media or members of the public could apply to join the hearing remotely in order to observe the proceedings. As such, the hearing was held in public.

**Hammad Baig, Counsel, instructed by SKS (GB) Ltd, for the Appellant**

**Paul Reynolds, Counsel, instructed by the General Counsel and Solicitor to HM Revenue and Customs for the Respondents**

## DECISION

### INTRODUCTION

1. The interlocutory hearing was for the purpose of allowing parties to make submissions in relation to their respective applications; namely:

(1) The Respondents' ('HMRC') application for an order for an amended Notice of Issues from the Appellant.

(2) The Appellant's application for further disclosure of documents.

2. A decision which set out the summary findings of fact and reasons was issued on 21 July 2021. That decision granted HMRC's application and refused the Appellant's application for disclosure. That decision, being in a Summary notice format, does not carry the right of appeal.

3. By email correspondence dated 18 August 2021, the Appellant's representative applied for an extension of time to appeal the decision, which was treated as an application for a 'Full Facts and Reasons' decision for the purposes of making an appeal. This is the Full Decision.

### FINDINGS OF FACT

#### Background

4. The subject matter of the conjoined appeals concerns three determinations made by the Respondents ('HMRC') in 2018, dated 20 March, 13 April, and 27 June, whereby the Appellant ('Greencyc') was notified that it was not entitled to its claim of input VAT deduction in the total sum of £760,022.92.

5. HMRC's determinations were based on the conclusion that the input VAT was incurred on purchases of electric goods that were connected with the fraudulent evasion of VAT, and that Greencyc knew or should have known of that connection in accordance with the judgments in *Axel Kittel v Belgium & Belgium v Recolta Recycling SPRL* (C-439/04 and C-440/04) [2008] STC 1537, ('*Kittel*') and *Mobilx Ltd & Others v Revenue and Customs Comrs* [2010] EWCA Civ 517, [2010] STC 1436.

6. In respect of the determinations, Greencyc lodged two notices of appeal on 18 April and 18 July 2018. The Appellant's stated grounds consist of asserting its ignorance on the one hand, and putting HMRC to proof on the other, of all constituent elements of the *Kittel* allegations.

7. The case management file in relation to these appeals has grown somewhat disproportionately to the progress made to date in advancing the appeals towards a hearing. It is appropriate at this juncture to summarise the correspondence that had led to the applications.

#### The 'Fairford' Directions of June 2019

8. The Tribunal issued Fairford Directions on 24 June 2019, by which Greencyc was ordered to serve a Notice of Issues for determination by 22 November 2019, to state, *inter alia*:

> (a) whether it accepts the transaction chains set out in the deal sheets by HMRC, and if not, to specify the issues for determination in all or any of the particularised deal sheets, and to specify any facts on which it will seek to rely;
>
> (b) whether it accepts its transactions were connected with the fraudulent evasion of VAT, and if not, to set out its response to HMRC's Statement of Case; and
>
> (c) in respect of the chains, if the appellant does not accept its transactions were connected to fraudulent tax loss, it shall particularise the evidence Greencyc seeks to rely on against the respondents' witness evidence, and at the same time, specify the parts of the respective witness statements it seeks to counter.

**The Appellant's responses to the Fairford Directions**

9. In relation to the Fairford Directions, three responses were made on behalf of Greencyc by Mr Steve Simmonite as Director of SKS (GB) Ltd, as its representative in these proceedings.

10. The *first* response was a Notice of Issues served on 12 December 2019, and consists of two pages with three paragraphs (double spaced), in which the Greencyc stated that:

> (a) 'The Appellant does not accept that the transaction chains set out in the deal sheets produced by [HMRC as] accurately reflect the trading history of the goods bought or sold'; that it 'can neither accept nor deny this assertion' as 'it has no way of testing this information'.
>
> (b) From the respondents' witness statements, 'it is evident' that 'the alleged defaulters were at all times being closely monitored', 'the Appellant wishes the Tribunal to determine' why HMRC 'failed in taking steps to prevent the alleged fraudulent tax loss'.
>
> (c) 'The Appellant cannot accept its transactions were connected with the fraudulent evasion of VAT. In August and September 2016 when the trades were taking place the Appellant had no means of knowledge of the case now set out'.

11. The *second* response was dated on 13 February 2020, consequent on HMRC's application of 12 February 2020 for an Order that the Appellant shall provide an amended Notice of Issues. In a three-page letter, Mr Simmonite wrote to 'oppose' the application, in which conflicting statements are made whereby:

> (a) The Appellant appears to accept that tax loss did occur, owing to fraud:
>
> > 'There are serious concerns about the depth in which any investigation was carried out as it seems that the officers have only scratched the surface in relation to each of the companies … [and] failed to prevent the tax loss, protect the revenue and innocent parties such as the Appellant.'
>
> (b) However, other statements appear to retreat from the assertion that there was fraudulent loss of tax which the Appellant held HMRC as having failed to prevent:
>
> > 'All paragraphs are in dispute other than facts, such as names, … date of company registration, the amounts of the transactions and the companies involved in the transaction. In essence, the assertions are made by the Respondents and they must establish that, as a result of their assertions, our client knew or ought to have known.'
>
> (c) The Appellant indicated that 'it intends to cross examine all of the [nine] officers, as each officer was monitoring a separate company involved in the fraud during the material time and afterwards', which would require 4 days with most time being spent on cross-examining Officer Tanday.

12. The *third* response by Mr Simmonite was dated 16 April 2020, (in reply to HMRC's reply of 4 March 2020). The substance of this response is to say:

> (1) The appellant does not accept that the companies involved in the deal chains, which are no longer trading, were fraudulent defaulters.
>
> (2) The appellant confirms all the areas are in dispute, and intends to cross examine all of HMRC's witnesses; and the final hearing is to be listed for the requisite time.
>
> (3) The appellant intends to test the witness evidence regarding the alleged fraudulent tax loss in the contra chain, and to challenge HMRC's evidence that the deals under appeal took place as set out in the deal sheets.

(4) The appellant asserts that 'none of officers explain why they failed to safeguard the Revenue or the Appellant and allowed the fraud to take place', and that it is relevant to its appeals, and a matter within the Tribunal's jurisdiction.

(5) The appellant requests disclosure of handwritten notebooks; contemporaneous notes typed up as reports; any internal digital notes made in relation to the investigations; internal notes of any senior officer's discussions with Officer Tanday, on the basis that these notes are relevant to understanding how HMRC reached its decisions.

**PARTIES' APPLICATIONS**

**HMRC's application for an Order to provide amended Notice of Issues**

13. By notice dated 12 February 2020, HMRC applied to the Tribunal for an Order whereby Greencyc shall provide an amended Notice of Issues to particularise: (a) which witnesses it intends to cross-examine; (b) which passages in relation to HMRC's witness statements it does not accept; and (c) the estimated duration to cross-examine each witness.

14. HMRC contend that Greencyc has not complied with the *Fairford* directions. The inherent contradiction of the Appellant's position has been highlighted to me, in that while Greencyc asserts that all matters are in dispute on the one hand, it has also advanced a (misguided) positive case that HMRC have failed to shield it from the fraud, the fact of which fraud Greencyc thereby appears to accept.

15. HMRC state that it is essential to establish prior to the substantive hearing whether matters relating to the tax loss and fraud elsewhere in the transaction history are truly in dispute. An order for compliance with the *Fairford* directions will enable the time duration of the substantive hearing to be more fairly estimated, which will in turn avoid wastage in time for the witnesses and the tribunal.

**The Appellant's application for disclosure**

16. Greencyc's response of 13 February 2020 to oppose the application included a cross-application for further disclosure of documents by HMRC, which was repeated in its letter dated 16 April 2020. The items requested are the following:

(1) 'To provide copies of the officers' handwritten notebooks relating to the notes of any interview they may have conducted or any contemporaneous notes they may have made in relation to their investigation.'

(2) 'To provide copies of any internal digital notes made in relation to their investigation, particularly internal notes of any senior officer relating to discussions with Officer Tanday or any other officer regarding the decision to refuse the Appellant the right to deduct input tax.'

17. Mr Baig was instructed to represent Greencyc in the applications hearing; his skeleton argument dated 25 November 2020 listed 14 items of documents sought for disclosure:

(1) Standard Information Package
(2) Visit booking letters
(3) Unannounced visit authorisation
(4) Visit report(s) and supporting handwritten notes
(5) HRA message and factsheet issue and receipt confirmation
(6) Chain of evidence documentation for uplifted materials/documents
(7) Referrals to other case teams/Tax Heads/Directorates
(8) Evasion Referral forms
(9) Kittel submissions to MTIC Technical Team
(10) Case conference notes

(11) Assessment schedules and letters
(12) Penalty schedules and letters
(13) Future Revenue Benefit or Revenue Loss Prevented calculations
(14) RIS feedback forms

18. Mr Baig stated that 'the disclosure may assist the Appellant in confirming to the Tribunal, the following':

> (a) 'The disclosure may enable the Appellant to confirm the accuracy of the deal sheets and/or to specify what issues it wishes the Tribunal to determine in respect of all or any particularised deal sheets';
>
> (b) 'The disclosure may assist the Appellant to either accept or deny that its transactions were connected with the fraudulent evasion of VAT';
>
> (c) 'If, as a result of the further disclosure, the Appellant is able to respond to points (a) and (b) above then the Appellant would also be able to confirm if there was a fraudulent tax loss which was connected to the Appellant's transactions.'

**REASONS**

19. In setting out my reasoning, it is expedient to address the Appellant's application first before turning to the Respondents' application.

**Appellant's application for disclosure**

20. The substantive issues to determine the appeal are directly relevant to my consideration of the disclosure application. The legal issues in this appeal are: (i) whether there had been a loss of tax in the deal chains; (ii) whether the loss of tax was the result of fraudulent evasion; and (iii) whether Greencyc knew or should have known that the transactions with which it was involved were connected with the fraudulent evasion of VAT: the so-called *Kittel* test with the first limb being of actual knowledge, and the second limb being of constructive knowledge.

21. The Appellant has not advanced a positive case that there had been no fraud in the deal chains. Crucially therefore, the burden of proof rests solely on the Respondents to establish that on the balance of probabilities, there is sufficient evidence to answer all three issues in the positive. It is not enough for HMRC to show that Greencyc was aware of the risk of VAT fraud. It is necessary for HMRC to establish that the Appellant knew or should have known that the transactions in question were connected to VAT fraud. The ultimate question in every *Kittel* case is whether HMRC have met the burden in accordance with the guidance given by the Court of Appeal in *Mobilix*. The *Kittel* test does not require the proof of dishonesty on the part of the Appellant. In other words, the proof of dishonesty is ***not*** a necessary prerequisite to disallow deduction of input tax: *HMRC v Citybank NA & Anr* [2017] EWCA Civ 1416.

22. The Tribunal hearing the case will be entitled to rely on inferences drawn from the primary facts established by HMRC to determine whether the Appellant had actual or constructive knowledge of its transactions being connected with VAT fraud. From the approach taken by Christopher Clark J in *Red12 v HMRC* [2009] EWHC 2563 at [109] to [111], which was approved by the Court of Appeal in *Mobilx* at [83], it is clear that the Tribunal should not unduly focus on whether a trader has acted with 'due diligence', but should consider the totality of the evidence, including circumstantial and 'similar fact' evidence.

23. The application for disclosure was made under Rule 5(3)(d) of the Tribunal Procedure (First-tier Tribunal)(Tax Chamber) Rules 2009 ('the Tribunal Rules'), which provides the Tribunal with the case management powers to 'permit or require a party or another person to provide documents, information or submissions to the Tribunal or another party'. Mr Baig referred me to *Tower Bridge GP Limited v HMRC* [2016] UKFTT 54 (TC), in which Judge

Richards considered the exercise of this Tribunal's case management powers in conjunction with Rule 31 of the Civil Procedure Rules ('CPR') governing disclosure in the Courts. However, as Judge Richards observed in *Tower Bridge*, the Tribunal does not generally impose a regime of 'standard disclosure' similar to that adopted in the Courts, and that the default position is set out in Rule 27(2) of the Tribunal Rules, which provides that each party will disclose to the other party *only* those documents on which it proposes to rely.

24. Rule 27 provides for the normal disclosure in a standard or complex case. HMRC have the burden of proof in this case; HMRC have produced their list of documents on which they intend to rely. Mr Reynolds helpfully took me through the actual documentation of over 4,000 pages that has been disclosed by HMRC to Greencyc. As regards witness evidence, HMRC has served eleven witness statements from eight officers. Two of these eleven statements are from Officer Tanday, and focus directly on Greencyc. One of Officer Tanday's statements dated 15 April 2019 is of 72 pages long, and sets out in detail HMRC's key interactions with Greencyc, including ten site visits. The reports of nine of these visits are disclosed, and the only visit without a report took place on 16 April 2014 for the sole purpose of uploading paper records. Lengthy exhibits to Officer Tanday's 72-page statement have also been disclosed.

25. The grounds of the application put forward for the Appellant are to say that the disclosure *may* assist the Appellant in three respects. I do not consider that the extent of the disclosure request is at all proportionate to the uncertain prospect of the relevance of the material. I reject each ground for its supposed relevance for the following reasons.

> (a) It is not encumbered upon the Appellant to confirm the accuracy of the deal chains; it is for HMRC to establish the factual content of the deal sheets, and for the Tribunal to decide if HMRC have met the onus. It is not for the Appellant to specify what issues it wishes the Tribunal to determine in respect of all or any particularised aspects of the deal sheets; the Tribunal can decide for itself.
>
> (b) It is not necessary for the Appellant to either accept or deny that its transactions were connected with the fraudulent evasion of VAT; the Tribunal can reach its own conclusion based on the evidence adduced by HMRC as regards the *Kittel* test without the Appellant having to state its position in any manner.
>
> (c) It is not necessary for the Appellant to confirm if there was fraudulent tax loss connected to the Appellant's transactions; that is for HMRC to prove.

26. In refusing the application, I have special regard that this is not a case where HMRC need to prove dishonesty by holding all the cards from their extensive investigation. I do not consider it appropriate to exercise the Tribunal's case management powers to order disclosure of the requested material on which HMRC place no reliance, and where the relevance of which is in doubt, and the extent of which is disproportionate. The grounds of application give no cogent or good reasons for me to exercise discretion by displacing Rule 27 as the correct framework within which litigation in this tribunal is to be carried out, especially in view of the fact that the Appellant has not advanced a positive case as such.

**Respondents' application for Amended Notice of Issues**

27. The principal objective of the *Fairford* Directions was clearly stated by the Upper Tribunal in *Elbrook Cash and Carry Ltd v HMRC* [2019] UKUT 201 (TC) at [52], which is:

> '… to enable the full hearing to be listed for an appropriate length of time given the number and identity of the witnesses that need to be called to give evidence. If there are, say, ten witnesses called by HMRC dealing only with the VAT Loss Issues and the appellant wishes to leave open until the final hearing the possibility of cross-examining each of them,

> then it is necessary to list the hearing both (1) for the length of time necessary to allow for that cross- examination and (2) on dates (at least potentially) that take into account their availability. If the appellant decides at or just before the hearing that it is unnecessary to cross-examine any of them, or only some of them, or on only very limited parts of their statements, then this risks wasting the time of the parties and the tribunal, leading to the possibility of void days in the hearing if witnesses scheduled to be heard later, under the original timetable, are unavailable on any earlier date.'

28. In short, *Fairford* directions are 'a tool of efficient case management', as described by the UT at [57] of *Elbrook*. The Appellant's *Fairford* responses suggest that there might have been some misapprehension of the real objective of the directions. It is apt to emphasise that compliance with the *Fairford* Directions is not for the purpose of forcing the Appellant to make an advance disclosure of its substantive position, or to disclose its cross-examination strategy prior to the actual hearing.

29. The *Fairford* directions are a case management tool because it is desirable that the duration of the hearing should be as fairly estimated as possible. Efficient case management is not just for the Tribunal to manage its resources efficiently in administering justice, but also essential to the costs budgeting for the litigating parties, so that the engagement of counsel in preparation time and for court attendance can be approximated to the actual requirement.

30. It is only with efficient case management of the appeal proceedings that parties can avoid wasted costs. Now that the Appellant has instructed counsel, Mr Baig is well placed to explain the implications of a potential costs order application in the absence of compliance with the *Fairford* directions. In the event that the Respondents are minded to make an application under Rule 10 of the Tribunal Rules (in relation to the case management aspects resulting in the applications hearing, not the substantive proceedings which are categorised as 'complex' with a different costs regime), the course of the parties' correspondence leading to the applications hearing has been outlined in this Decision.

**DISPOSITION**

31. Directions were issued separately to grant the Respondents' application on 21 July 2021.

**RIGHT TO APPLY FOR PERMISSION TO APPEAL**

32. 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.

**DR HEIDI POON**
**TRIBUNAL JUDGE**

**RELEASE DATE: 10 SEPTEMBER 2021**