Neutral Citation: [2022] UKFTT 367 (TC)

Case Number: TC08617

FIRST-TIER TRIBUNAL
TAX CHAMBER

By remote video hearing

Appeal reference: TC/2020/04216

PROCEDURE – Application by the Appellant to clarify and amend its grounds of appeal – whether amendments should be allowed – whether proposed amendments constitute an abuse of process – application refused

Heard on: 26 September 2022
Judgment date: 11 October 2022

Before

TRIBUNAL JUDGE
ROBIN VOS

Between

C4C INVESTMENTS LIMITED

Appellant

and

THE COMMISSIONERS FOR HIS MAJESTY'S REVENUE AND CUSTOMS

Respondents

Representation:

For the Appellant: **TIM BROWN** of counsel instructed by SKS (GB) Limited

For the Respondents: **JOSEPH MILLINGTON** of counsel, instructed by the General Counsel and Solicitor to HM Revenue and Customs

DECISION

INTRODUCTION

1. The appellant, C4C Investments Limited ("C4C") has appealed to the Tribunal against penalties assessed on 13 January 2020 totalling £162,587.31 under the provisions of Schedule 24 Finance Act 2007 in respect of inaccuracies in its VAT returns. The penalties have been assessed on the basis that the inaccuracies were deliberate.

2. The inaccuracies in question relate to input tax claimed on purchases by C4C from DB Recycling Limited ("DBR"). Mr David Bassey was the sole director of DBR. He was also the operations manager of C4C. It is common ground that he had responsibility for VAT compliance in respect of both companies.

3. Whilst C4C submitted VAT returns claiming a deduction for input tax in respect of the purchases from DBR, DBR did not submit any VAT returns and did not therefore account for the output tax on the sales to C4C.

4. In December 2018 and February 2019, HMRC notified C4C that the input tax claims were denied under the principles set out by the European Court of Justice in the joint cases of *Axel Kittel v Belgian State* and *Belgian State v Recolta Recycling SPRL* (C-439/04 and C-440/04). These cases confirm that a deduction for input tax can be denied if the taxpayer knew or should have known that it was participating in a transaction connected with the fraudulent evasion of VAT. The total amount of input tax in question is approximately £320,000. The notices denying the input tax deduction are referred to as the "*Kittel* denials". C4C did not appeal against the *Kittel* denials but instead sought to pay the outstanding liabilities.

5. In early 2020, C4C engaged SKS (GB) Limited ("SKS"). On behalf of C4C, SKS requested a review of the penalties and, in March 2020, prepared a detailed report for the purposes of the review. This report did not seek to challenge the *Kittel* denials nor the categorisation of the inaccuracies as deliberate. Instead, it argued that the penalties should be lower for two reasons:

   (1) C4C and DBR had made payments in relation to the VAT liabilities and so the unpaid VAT on which the penalties were based should be a much lower figure than that used by HMRC; and

   (2) C4C should have been given a larger reduction in respect of its assistance in relation to HMRC's enquiries so that the penalty should have been the minimum for a deliberate inaccuracy and a prompted disclosure, being 35% of the tax in question.

6. The penalties were however upheld on review, prompting C4C's appeal to the Tribunal.

7. The grounds of appeal contained in the notice of appeal to the Tribunal state that "*the level of penalty imposed and the PLR figures are both incorrect*". This is then followed by a more detailed explanation which largely repeats the conclusions of the report prepared by SKS for the purposes of the HMRC review. The final paragraph of the grounds of appeal states that, if a penalty is considered appropriate, it should be based on 35% of a much lower figure than the one used by HMRC.

8. HMRC produced a statement of case in relation to the appeal on 7 April 2021. The statement of case noted that there had been no appeal against the *Kittel* denials and that the grounds of appeal contained no challenge to the deliberate nature of the inaccuracies. It is this which prompted C4C's application in June 2021 to clarify and amend its grounds of appeal.

THE NATURE OF THE APPLICATION

9. There was some confusion about the precise application which was being made by C4C. The opening paragraph stated that the application was to "*clarify its grounds of appeal and seek permission to amend the grounds of appeal*".

10. It went on to explain that the clarification was that the reference to the "*level of the penalty*" included a reference to whether the inaccuracy was deliberate or careless. The amendment sought is to add additional grounds of appeal to the effect that:

(1) The transactions on which C4C claimed input tax were not fraudulent; and

(2) In any event, C4C neither knew those transactions were connected to fraud, nor should it have known that they were connected to fraud.

11. The reason for the confusion is that if the amended grounds of appeal are made out, there would be no liability to a penalty at all (as there would be no VAT liability to which the penalty could attach) and so the question whether C4C's behaviour was deliberate or careless would be irrelevant.

12. Mr Brown however confirmed on behalf of C4C that there are indeed two elements to the application, being the clarification in relation to deliberate or careless behaviour and the addition of a further ground of appeal as set out above.

13. In relation to the first limb of the application, it is clear to me that a challenge to the nature of the inaccuracy as being careless rather than deliberate is not a clarification of the existing grounds of appeal but is instead an amendment or addition to the grounds of appeal.

14. Whilst it is true that the grounds of appeal state that the "level" of the penalty is incorrect, it is quite clear from the subsequent detailed explanation of the grounds of appeal that this relates only to the percentage reduction for assistance in HMRC's enquiries and is not intended to refer to whether the behaviour was deliberate or careless. This is apparent from the fact that the final submission in the grounds of appeal is that the level of the penalty should be reduced to 35% which is the minimum penalty which can be charged in respect of a deliberate inaccuracy where the disclosure is prompted. In the case of a careless inaccuracy, the minimum penalty for a prompted disclosure is 15%.

15. I therefore proceed on the basis that both applications are, in substance, applications to add further grounds of appeal in addition to those stated in the original notice of appeal to the Tribunal.

AMENDMENTS TO GROUNDS OF APPEAL – PRINCIPLES TO BE APPLIED

16. Mr Millington, on behalf of HMRC, referred to the decision of the High Court in *Essex County Council v UBB Waste (Essex) Limited* [2019] EWHC 819 (TCC). Peperall J helpfully reviewed at [8-11] the principles relating to applications to amend pleadings set out in *Quah Su-Ling v Goldman Sachs International* [2015] EWHC 759 and *CIP Properties (AIPT) Limited v Galliford Try Infrastructure Limited* [2015] EWHC 1345 (TCC) as well as adding his own comments. To the extent relevant to this application, the principles the Tribunal should apply can be summarised as follows:

(1) Whether to allow an amendment is a matter for the discretion of the Tribunal which must be exercised in accordance with the overriding objective of dealing with cases fairly and justly. This involves striking a balance between injustice to the applicant if the amendment is refused and injustice to the opposing party and other litigants in general if the amendment is permitted (*Quah* at [38(a)]. Dealing with appeals at a proportionate cost and avoiding delay where this is compatible with a proper consideration of the issues are part of the overriding objective in rule 2 of the Tribunal Rules.

(2) An application to amend is late if it could have been made earlier and the reasons for any delay are a relevant factor (*CIP Properties* at [19(a)] and *Essex CC* at [10]).

(3) An application to amend will normally be refused if the proposed amendment has no reasonable prospect of success (applying the test for summary judgment or striking out) (*Quah* at [36] and *Essex CC* at [11.1]).

(4) The consequences of allowing the amendment (for example in terms of further evidence and additional work for the parties) also needs to be taken into account. This will however be more relevant, the later the application is made during the course of the proceedings (*Essex CC* at [11.3]).

APPLICATION OF THE PRINCIPLES TO THE PROPOSED AMENDMENTS

17. In my view, the application to amend is late. There is no reason why the grounds of appeal which C4C now seeks to rely on could not have been part of the original grounds of appeal contained in the notice to the Tribunal in November 2020. It appears that they were prompted by the contents of HMRC's statement of case but no explanation has been put forward by or on behalf of C4C as to why these grounds of appeal were not raised any earlier. Given the early stage of proceedings, it may well be said that this does not provide a strong reason for refusing the application to amend. It would however mean that HMRC will need to amend its statement of case and is certainly a factor which should be weighed in the balance.

18. Looking at the consequences of allowing the amendments, it is clear that they significantly widen the scope of the dispute between the parties. In particular, evidence would be required as to the basis on which it is said either that there was no fraud involved in relation to the transactions in question or, if fraud were involved, how C4C could not have been aware of the fraud given that Mr Bassey was responsible for the VAT returns of both C4C and DBR.

19. No doubt the burden in relation to such evidence would fall principally on C4C rather than HMRC. However, HMRC will be put to the cost and expense of dealing with such evidence. It will also extend the length of any hearing and therefore consume greater Tribunal resources. Again, this is not a factor which, on its own, would lead to a refusal to allow the application to amend the grounds of appeal but it needs to be taken into account.

20. As far as the balancing exercise is concerned, the main point relied on by Mr Millington on behalf of HMRC in opposing the application to amend is that, in his submission, the amendments have no reasonable prospect of succeeding. In support of this submission, Mr Millington refers to the following:

(1) C4C has never put forward any innocent explanation as to the circumstances in which Mr Bassey arranged for C4C to file VAT returns claiming credit for the input tax relating to the relevant transactions whilst failing to ensure that DBR submitted VAT returns accounting for the output tax.

(2) C4C never appealed against the *Kittel* denials but instead sought to pay the tax which HMRC said was due.

(3) The denial of any knowledge of fraud is, says Mr Millington, inconsistent with the existing grounds of appeal which contain the following:

> "*We do not consider these allowances give full recognition to the assistance provided in relation to 'telling' and 'helping'. HMRC's narrative on the penalty explanation form concedes that in relation to 'telling', 'the company has accepted that there was a deliberate defaulter and has started to pay back the input tax denied.* "

> Mr Millington submits that the inference from this paragraph is that C4C accepts the existence of a "*deliberate defaulter*" (i.e. DBR). If this is right, he argues that it is inconsistent now to say that C4C was unaware of any fraud.

21. As far as the difference between deliberate and careless behaviour is concerned, Mr Millington's submission is that this question only becomes relevant if it is found by the Tribunal that C4C knew or should have known that the transactions were connected with the fraudulent evasion of VAT. Whilst he accepts that it is possible for the inaccuracy not to be deliberate if C4C did not actually know that the transactions were connected with the fraudulent evasion of VAT but only had the means of such knowledge, in circumstances where Mr Bassey was representing both companies in relation to their VAT affairs, he argues that any refusal of the entitlement to deduct input tax on the basis of *Kittel* can only have been on the basis that C4C did in fact know of the connection with the fraudulent evasion of VAT rather than simply that it should have known of such a connection. Any inaccuracy would therefore have been deliberate.

22. For his part, Mr Brown notes that C4C has never accepted either that any fraud was involved in relation to the relevant transactions nor that any inaccuracy in its VAT returns was deliberate. In this respect, he draws attention to the fact that the review report prepared by SKS states that the tax payments made by C4C were made "without accepting the culpability of any of the companies or personnel involved". He points out that the burden of proving a connection with the fraudulent evasion of VAT will be on HMRC. He also observes that one possible reason for C4C not appealing against the *Kittel* denials is that DBR had not paid or accounted for the output tax and so there was no potential double tax liability.

23. Finally, Mr Brown submits that the question as to whether there was any fraudulent evasion of VAT and indeed whether there were any deliberate inaccuracies in C4C's VAT returns depends on Mr Bassey's state of mind, as to which there is currently little, if any, evidence pending the exchange of witness statements which has not yet taken place.

24. I am conscious that in assessing whether the proposed new grounds of appeal have a reasonable prospect of succeeding, the Tribunal should not conduct a mini-trial (see *Swain v Hillman* [2001] 1 All E.R.91) and that the Court should take into account any evidence which can reasonably be expected to be available at the hearing (*Royal Brompton Hospital NHS Trust v Hammond*) No. 5 [2001] EWCA Civ 550).

25. Whilst Mr Bassey's witness evidence will of course be relevant in determining whether there has been any fraudulent evasion of VAT and that evidence is not yet available to the Tribunal, I am nonetheless satisfied that the proposed new grounds of appeal have no realistic prospect of success. Essentially, this is for the reasons put forward by Mr Millington but I will summarise my own reasons.

26. The fact that Mr Bassey arranged for C4C to claim a deduction for the input tax whilst at the same time failing to ensure that DBR accounted for any output tax gives rise to a strong inference that the transactions were connected with the fraudulent evasion of VAT. In this context, I note that the *Kittel* denials refer to the fact that Mr Bassey had been subject to a previous *Kittel* denial and so would have been aware of the inability to deduct input VAT where there is a connection with fraud. At the very least, this would shift the evidential burden onto C4C.

27. The *Kittel* denials were not appealed. It is apparent from the evidence that C4C initially indicated that it wished to appeal against the *Kittel* denials. It also appears that, at that stage, C4C was not professionally represented (SKS only being appointed in early 2020). However, no appeal was in fact made and C4C attempted to pay the tax which HMRC said was due. This is a surprising position to take if C4C did not consider that there was any fraud involved and

that the input tax was therefore deductible. Contrary to Mr Brown's submission, it also cannot be explained by the fact that DBR had not accounted for the output tax so that there would be no double counting as it is clear from the SKS review report that DBR did in fact pay over £100,000 towards its VAT liabilities.

28. C4C has never previously suggested to HMRC or to the Tribunal that no fraud was involved and that the input tax should therefore have been allowed. In particular, this formed no part of the review report prepared by SKS on behalf of C4C. If C4C or Mr Bassey genuinely believed that the transactions in question were not connected with the fraudulent evasion of VAT, it is inconceivable that this would not have been mentioned as part of the appeal against the penalties and the subsequent review process.

29. Prior to the engagement of SKS, Mr Bassey corresponded with HMRC in relation to the penalties. He stated that the inaccuracies in C4C's VAT returns were not deliberate. However, the basis for this was that, after the facts had been uncovered by HMRC, C4C and DBR made payments in relation to the outstanding VAT. In particular, there is no suggestion in the correspondence from Mr Bassey to HMRC that the failure by DBR to account for the output tax whilst C4C was claiming a deduction for the input tax was not deliberate. The fact that the subsequent report by SKS makes no suggestion that the inaccuracies were anything other than deliberate is strong evidence that C4C accepted that this was the case.

30. C4C's original grounds of appeal to the Tribunal in my view also indicate that C4C accepted that the transactions were connected with fraud. As Mr Millington has pointed out, one of C4C's arguments as to why it should have been given a bigger reduction in the amount of the penalties is that HMRC had conceded that C4C accepted that there was a deliberate defaulter.

31. I appreciate that this is reference to what HMRC had written, which in turn appears to be an inference drawn by HMRC from the facts known to them. However, the reference to this being a concession on the part of HMRC can only be understood as indicating that C4C did indeed accept that there had been a deliberate defaulter.

32. It is also apparent from the report put forward in respect of the review by HMRC and the grounds of appeal put forward to the Tribunal that, at that stage, C4C accepted the categorisation of the inaccuracies as being deliberate. This is clear from the argument that the penalty should be reduced to the minimum 35% applicable to deliberate inaccuracies and not the minimum 15% applicable to careless inaccuracies.

33. In the light of this evidence, it is in my view fanciful to suggest that any oral evidence which could now be put forward by Mr Bassey could tip the balance in favour of there being some innocent explanation for the transactions which took place and the way in which VAT was accounted for. The position might be different if there had previously been any hint that C4C did not accept HMRC's denial of the input tax, but the evidence shows that this is simply not the case.

34. Admittedly more in relation to his argument that the proposed second new ground of appeal is an abuse of process (as to which, see below), Mr Millington also suggests that C4C should not be permitted to put forward a ground of appeal which is inconsistent with its existing grounds of appeal. The second proposed new ground of appeal asserts that there was no connection to the fraudulent evasion of VAT. The existing grounds of appeal relating to the reduction for co-operation however take the position that C4C has accepted that there was a deliberate defaulter.

35. It is hard to see how these two statements could co-exist if the notice of appeal were a pleading which had to be verified by a statement of truth. However, rather than being a factor

in its own right which should be weighed in the balance in deciding whether to allow the application to amend, on the facts of this case it is more naturally one of the factors (discussed at paragraphs [30-31] above) which leads to the conclusion that the second proposed new ground of appeal has no realistic prospect of success.

36. I accept Mr Millington's submission that, once it is found that there is no realistic prospect of C4C succeeding in its argument that the transactions were not connected with the fraudulent evasion of VAT, there is also no realistic prospect of C4C being able to establish that the inaccuracies were not deliberate given that Mr Bassey was responsible for the VAT compliance of both DBR and C4C. This cannot be a situation where, if fraud was involved, C4C had anything other than actual knowledge of that fraud.

37. Based on this, there is in my view no real injustice to C4C in refusing its application to clarify and amend its grounds of appeal. The proposed new grounds have no realistic prospect of success for the reasons I have given. In my view, had they originally been included in the notice of appeal, an application on the part of HMRC to strike out those grounds would have been successful. In addition, to the extent that it could be said that there is any injustice to C4C, it has brought it on itself by failing to include the new grounds of appeal as part of its original grounds (see *CIP Properties* at [9(f)]).

38. Given that there is no realistic prospect of success, that the application to amend is late and there is no good reason why the new grounds were not raised at an earlier stage, it would not be in accordance with the overriding objective to require both HMRC and the Tribunal to expend resources in dealing with the proposed new grounds of appeal including the additional evidence which would be required and the corresponding increase in the length of the hearing which would result from this.

39. Permission to introduce the two new grounds of appeal contained in C4C's application dated 14 June 2021 is therefore refused.

ABUSE OF PROCESS

40. HMRC accept that, as a matter of general principle, an appeal against a penalty imposed under Schedule 24 Finance Act 2007 can include a challenge in respect of matters relevant to the original assessment, such as the amount of the assessment (see *Andrew v HMRC* [2016] UKFTT 0295 (TC) at [38]). However, on the particular facts of this appeal, HMRC object to the introduction of the second new ground of appeal (that there was no fraud involved) on the basis of the doctrine of abuse of process.

41. In short, Mr Millington submits that it is an abuse of process for C4C to rely in its appeal against the penalties on what is essentially a challenge to the *Kittel* denials in circumstances where it chose not to appeal against the *Kittel* denials and where (as described above) the acceptance by C4C of the existence of a deliberate defaulter is relied on as a separate ground of appeal.

42. Given that I have refused C4C's application as an exercise of the Tribunal's discretion, it is not strictly necessary for me to consider whether the application should be refused in any event on the basis that it amounts to an abuse of process. However, as the point was argued, I will deal with it briefly.

43. In my view, this argument is misconceived. Mr Millington referred to the decision of the First-Tier Tribunal in *Hackett v HMRC* [2016] UKFTT 0781 (TC). The Tribunal refers at [33] to the well-known explanation of the principle by Lord Bingham in *Johnson v Gore Wood & Co (a firm)* [2002] 2 AC 1 at [page 31] where he observed that:

> "*... Henderson v Henderson abuse of process, as now understood, although separate and distinct from cause of action estoppel and issue estoppel, has*

> *much in common with them. The underlying public interest is the same: that there should be finality in litigation and that a party should not be twice vexed in the same matter. This public interest is re-enforced by the current emphasis on efficiency and economy in the conduct of litigation, in the interests of the parties and the public as a whole. The bringing of a claim or the raising of a defence in later proceedings may, without more, amount to abuse if the Court is satisfied (the onus being on the party alleging abuse) that the claim or defence should have been raised in the earlier proceedings if it was to be raised at all.*"

44. Abuse of process, properly understood, therefore is referring to the abuse of the process of the Court or Tribunal. This is consistent with the observation of Lord Millett, also in *Johnson v Gore Wood* at [page 59] that the abuse of process principle is no more than a procedural rule based on the need to protect the process of the Court from abuse and the defendant from oppression.

45. That is of course why abuse of process, as Lord Bingham explained, has much in common with cause of action estoppel and issue estoppel which may prevent a party to litigation from challenging a conclusion reached by a Court or Tribunal in prior proceedings between the same parties (or their privies).

46. Given this underlying principle, it is difficult to see how it can be an abuse of the Tribunal's process to raise an issue which has not previously been raised before the Tribunal in other proceedings. The Tribunal has not previously been required to expend resources in determining the matter and HMRC has not (in the words of Lord Bingham) previously been vexed by the same matter.

47. Mr Millington draws attention to the conclusion of Lord Bingham *Johnson v Gore Wood* at [page 31] that, whether the raising of a particular point is an abuse of process is:

> "*A broad, merits-based judgment which takes account of the public and private interests involved and also takes account of all the facts of the case, focusing attention on the crucial question whether, in all the circumstances, a party is misusing or abusing the process of the Court by seeking to raise before it the issue which could have been raised before."*

48. I accept that any assessment as to whether raising a particular issue is an abuse of process requires the Tribunal to look at all the circumstances of the case. However, this still does not lead to the conclusion that there may be an abuse of process in circumstances where there have been no previous proceedings.

49. Mr Millington objects that this analysis of the principle puts a taxpayer who fails to appeal against an underlying assessment but who then wishes to challenge that assessment in an appeal against a subsequent penalty in a better position that somebody who does appeal against the original assessment but then fails to pursue the appeal so that it is struck out or decides to withdraw the appeal.

50. I agree with this conclusion but, as a matter of principle, it is in my view the correct result. A taxpayer who does in fact appeal against the underlying assessment but then loses that appeal (for whatever reason) may well be vulnerable to a challenge on the basis of abuse of process if they then try to raise the same arguments in a subsequent appeal against a penalty based on the same assessment.

51. That is not to say that the abuse of process challenge would be successful. This will depend on all the circumstances of the case. This is clearly shown by the decision of the Court of Appeal in *HMRC v Kishore* [2021] EWCA Civ 1565 (which Mr Millington very fairly drew

to my attention (with the agreement of Mr Brown) following the hearing). Such circumstances may include the reason for the original appeal failing (see *Hackett* at [43-46]).

52. As I observed to Mr Millington during the hearing, none of the authorities he referred to involved a finding of abuse of process in circumstances where there had been no previous proceedings. Following the hearing, Mr Millington also drew my attention to the decision of the First-Tier Tribunal in *Balazs v HMRC* [2021] UKFTT 0354 (TC). That appeal was similar to the present case in that there was no appeal against the underlying assessments but only against the subsequent penalties. Like this appeal, it was also a case where the underlying assessments related to *Kittel* denials for the deduction of input VAT.

53. HMRC argued that it would be an abuse of process for the appellants to argue that there should be no penalty on the basis that they did not know that any fraud had taken place. The Tribunal dismissed this argument at [23-24] concluding (based on the reasoning in *Hackett*) that there is no abuse of process where there has been no previous determination of the facts and issues by the Tribunal. For the reasons I have already explained, I would agree that this was the right decision.

54. I accept that the inconsistency between the proposed new grounds of appeal and the existing grounds of appeal is a factor to take into account in any assessment as to whether raising the new grounds might be an abuse of process. However, given what I have already said about the underlying principles, this cannot make any difference to the outcome in this case.

55. Therefore, had I considered it right to allow the application to add the new grounds of appeal in exercise of the Tribunal's discretion, I would not then have refused to allow the application on the basis that it represented an abuse of process.

DIRECTIONS

56. Given that I have refused the application to amend the grounds of appeal, there will be no need for HMRC to revise its statement of case. The existing directions dated 26 July 2021 (which were agreed between the parties) will however need to be updated with new dates for compliance and a new hearing window.

57. The Tribunal therefore directs that the parties shall, no later than 14 days from the date of the issue of this decision provide to the Tribunal agreed proposed case management directions or, if no agreement is possible, each party shall, by the same date, provide their own proposed directions highlighting any points which are not agreed.

RIGHT TO APPLY FOR PERMISSION TO APPEAL

58. 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.

ROBIN VOS
TRIBUNAL JUDGE

Release date: 11th OCTOBER 2022