Neutral Citation: [2023] UKFTT 00656 (TC)

Case Number: TC08877

FIRST-TIER TRIBUNAL
TAX CHAMBER

[By remote video/telephone hearing]

Appeal reference: TC/2021/02621
TC/2022/11738, TC/2022/13945
TC/2022/13946, TC/2023/00281
TC/2023/00282, TC/2022/00383
TC/2022/13665

PROCEDURE – strike out application under rule 8(1) FTT Rules on ground that no decision made by HMRC – granted subject to an unreasonable costs order against HMRC – request for further and better particulars sought by Appellant requiring particularisation of nature of fraud in Kittel appeal – refused.

Heard on: 7 June 2023
Judgment date: 25 July 2023

Before

TRIBUNAL JUDGE AMANDA BROWN KC

Between

FOUNDRY SUPPLIES UK LIMITED
ANTHONY GARY CHAPMAN
WILLIAM FIRST

Appellant

and

THE COMMISSIONERS FOR HIS MAJESTY'S REVENUE AND CUSTOMS

Respondents

Representation:

For the Appellant: Mr H Watkinson of counsel

For the Respondents: Mr B Hayhurst of counsel, instructed by the General Counsel and Solicitor to HM Revenue and Customs

DECISION

INTRODUCTION

1. With the consent of the parties, the form of the hearing was a video hearing using the Tribunal video hearing system. A face-to-face hearing was not held because it was expedient not to do so. The documents to which I was referred are contained in a bundle consisting of 1353 pages. I was also provided with an authorities bundle and skeleton arguments from both parties.

2. 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.

BACKGROUND

3. The various appeals in this matter concern HMRC's refusal to permit Foundry Supplies UK Ltd (**Foundry**) to claim input tax on supplies made to it on the grounds that the supplies in question form part of a chain of transactions which were connected with the fraudulent evasion of VAT and that Foundry either knew or should have known of that fact. Such assessments are, HMRC contend, made in accordance with the CJEU determination in the matter of *Axel Kittel v Belgian State* C-439/04 and C-440/04 (**Kittel**). The appealed decisions are decisions to disallow input tax whilst verifying VAT returns, assessments to overclaimed VAT in respect of returns that had been processed, the imposition of penalties and company officer liability notices issued to Mr Chapman and Mr Firth for collection of the penalties issued to Foundry.

4. This hearing was listed to determine an number of case management matters.

5. Initially HMRC had applied to join a number of appeals bought by the three Appellants. The Appellants initially objected to that application but prior to the listed hearing the Appellants withdrew their objection in consequence, the appeals were joined for case management purposes and will be heard together in due course. As such that is no longer an issue which must be determined

6. On 27 March 2023, by their statement of case, HMRC applied to strike out appeal reference TC/2022/13652 (this followed a letter dated 9 March 2022 in which HMRC had indicated that they considered the appeal to be duplicative and invited Foundry to withdraw the appeal). That application was particularised on 11 May 2023 and further particularised on 25 May 2023. In essence, HMRC contend that the Tribunal has no jurisdiction in relation to the appeal under that reference on the basis that the letter dated 14 September 2022 and identified as containing the appealable decision does not, in fact, contain a decision falling within section 83(1) Value Added Tax Act 1994, and/or that it is duplicative of the later appeal under reference TC/2022/13945 and/or it is abusive to pursue both appeals.

7. Consequent upon the strike out application Foundry applies for HMRC to be barred from participation in the appeal reference TC/2022/13652 and for it to be summarily determined in Foundry's favour on the basis that HMRC have accepted that the terms of the letter of 14 September 2022 were wrong the appeal must succeed.

8. Foundry, Mr Chapman and Mr Firth also apply for further and better particulars of paragraph [79] of HMRC's forth consolidated statement of case. Paragraph [79] provides:

> "Whilst is not necessary for the Respondents to prove that the deals form part of an overall scheme or schemes to defraud the public revenue, it is averred that such was in fact the case."

9. The original application requested:

(1) The particulars of the alleged overall scheme or schemes to defraud the public revenue.

(2) Whether it is alleged that the scheme is an MTIC fraud or other type of fraud? and

(3) Whether dishonestly is alleged against the Appellant.

10. HMRC confirmed that they do not allege dishonesty against any of the Appellants. However, HMRC contend that they have adequately particularised their case, in particular, by reference to a document named Annex A served in response to the request for further and better particulars. HMRC rely on the evidence which establishes fraudulent tax losses within the chain of supplies to which Foundry are party and contentions as to the improbability of co-incidence, repeated pattern of being supplies by traders who then go on to be de-registered, that traders in Foundry's supply chains repeatedly participared in schemes to defraud the revenue, Foundry's repeatedly poor stock control, the trading model and environment, its failure to take basic steps to protect their own commercial interests, and a failure to produce documents. Together these factors, HMRC contend, demonstrate that there was an overall scheme to defraud, and the precise classification of that scheme is unnecessary.

THE STRIKE OUT APPLICATION/APPLICATION TO BAR

11. The Tribunal is required to strike out an appeal pursuant to rule 8(1) Tribunal Procedure (First-tier Tribunal (Tax Chamber) Rules (**FTT Rules**) where it has no jurisdiction in relation to the appeal. It may strike out an appeal pursuant to rule 8(3)(c) of the FTT Rules where, despite having jurisdiction, the appeal has no reasonable prospect of success or where the appeal represents an abuse of process.

12. On 14 September 2022 HMRC issued a letter to Foundry in respect of the 04/22 VAT return which stated:

> "As a result of our enquiries in respect of your VAT return, we know that 178 of the transactions (where the whole chain has been established, commenced with a defaulting trader, **resulting in a loss to the public revenue that exceeds £1,300,000**. Because of this fact, your repayment claim for this period totalling £85,643, will not be paid.
>
> …
>
> Checks are still ongoing into the remaining transactions undertaken in the aforementioned period with a view to gathering further supporting documentary evidence.
>
> …
>
> The fact that this notification of tax loss letter has been issued to you does not limit HMRC's right to deny input tax in respect of these transactions under the Kittel principle. If HMRC denies you your right to recover input tax under the Kittel principle you will also be liable to a penalty …"
>
> (original emphasis)

13. By their letter of 3 October 2022 in further correspondence HMRC stated:

> "In respect of the input tax which has been disallowed for 04/22, I can simply say that, when conducting a review of the supply chains within this period, concerns were highlighted in respect of certain transactions and, for this reason, the input tax was disallowed."

14. On 7 October 2022 Foundry lodged an appeal in respect of the 14 September 2022 letter. It was allocated the number TC/2022/13652.

15. Subsequently, on 26 October 2022, under cover of a letter headed "Notification of a decision to refuse entitlement to the right to deduct input tax", HMRC gave formal notification of the adjustment made to the 04/22 VAT return.

16. HMRC contend that the appeal reference TC/2022/13652 was made on the mistaken basis that the notification of tax loss letter was an assessment or otherwise met one of the descriptions within s83(1) VATA. As the assessment refusing input tax credit was made subsequently on 26 October 2022 the appeals are, at least, duplicative (see paragraph [6.] above). HMRC contend that it is for the Appellant to show that the Tribunal has jurisdiction, and it cannot do that by reference to the letter of 14 September 2022. HMRC note that no right of appeal was notified in the letter. They also contend that if what they consider to be a standard tax loss letter is to be treated as an appealable decision it will frequently kick start an appeal process before they have finished investigating input tax entitlement.

17. Foundry object to the application on the basis that the terms of the letter of 14 September 2022, particularly in light of the confirmation provided in the letter of 3 October 2022, are enough for the letter to meet the description of an appealable decision under either s83(1)(c) VATA (the amount of any input tax which may be credited to a person) or s83(1)((e) (the proportion of input tax allowable under section 26). Foundry also contend that on the basis of HMRC's position the appeal should be allowed.

18. As I communicated in the hearing I determined that the appeal reference TC/2022/13652 should be struck out. I am not satisfied that the terms of the letter represent a decision regarding the amount of input tax to be credited and the letter expressly indicates that HMRC have not made the decision to deny input tax. The letter itself is sufficiently clear that the repayment return as rendered would not, at that time, be paid and the fact of the tax loss notification letter did not preclude an assessment being raised to deny the input tax credit referenced in the letter. It is not therefore a decision as to the amount of any input tax allowable nor does it concern the attribution/apportionment of input tax. I do not consider either that it is a decision capable of meeting any of the other decisions listed in section 83(1) VATA with the consequence that any appeal against it is one in respect of which the Tribunal has no jurisdiction and which therefore I must strike out under rule 8(1) FTT Rules.

19. However, Foundry's concern that it needed to protect its position and bring an appeal was perfectly understandable. HMRC had communicated that they were denying repayment on the return and subsequently confirmed that they had denied input tax. The letter of 14 September 2022 was not in the same format as other notification of tax loss letters which do not, as I understand and by reference to other notification of tax loss letters in the bundle, state that repayment of any sum will be denied. Whilst therefore, I consider that the letter does not meet a description of a decision in section 83(1) VATA (and hence strike out the appeal) the letter was ambiguous, the position was compounded and became confusing when HMRC followed up that letter and within the required period in which an appeal must be bought or review requested, with an indicated confirmation that the original 14 September 2022 letter had denied recovery of input tax. The Appellant was put to the unnecessary expense of brining an appeal or at least request a review so as to protect its position in light of the confusing correspondence from HMRC.

20. As a consequence and as also communicated in the hearing I consider that HMRC's conduct in connection with the strike out application itself warranted an order that HMRC pay Foundry's costs associated with brining the appeal in respect of the 14 September 2022 letter. The Tribunal has power to make such an order pursuant to rule 10(2)(b) FTT Rules.

During the hearing I indicated that in my view HMRC's correspondence was confusing and Foundry's decision to bring the appeal was a reasonable course for it to take. HMRC's conduct in respect of the application was also poor. They first referenced their intention to seek a strike out of the appeal in their statement of case, but they did not, at that time, make the application. The application was not made until 11 May 2023 at which time HMRC admitted that they had made a mistake in the letter of 3 October 2022 but still did not make the application on the basis of a lack of jurisdiction.

21. In accordance with the requirements of rule 10 FTT Rules, and prior to making the order I gave them the opportunity to make submissions as to their liability to costs and the period for which they should be payable. HMRC conceded that it should be liable for costs for the period from 7 October 2022 (when the appeal was lodged) until 27 October 2022 (the date after they had issued the formal assessment notification by which the input tax was formally denied). They contended that nothing happened on the appeal between 27 October 2022 and 9 March 2023 when the statement of case was issued in which the strike out application was first mooted. HMRC resisted costs being awarded for any period post 9 March 2022 the date on which they had written to Foundry inviting them to withdraw the appeal.

22. I determined that HMRC should be liable to pay Foundry's costs for the period from 7 October 2022 to 31 May 2023 insofar as the costs relate to the strike out application. Costs in respect of the Appellants' application for further and better particulars and in resisting, but ultimately conceding, HMRC's joinder application should be excluded from the claim. The costs are to be assessed if the parties cannot agree them.

23. I consider it appropriate that the costs be paid until 31 May 2023 because:

(1) The letter of 14 September 2022 is not clear and does not reflect the standard tax loss letter. That input tax had been denied was specifically stated in the subsequent letter of 3 October 2022.

(2) HMRC failed to make any formal application to strike out until 11 May 2023 and it was only on that date that they conceded that the correspondence had been misleading costs.

(3) HMRC's case succeeded on the basis that the Tribunal had no jurisdiction but lack of jurisdiction was not advanced by HMRC until 31 May 2023.

(4) HMRC could have made the full application at any time from 9 March 2023 (when they had first identified the issue) onwards and would, in doing so, have avoided the costs award.

FURTHER AND BETTER PARTICULARS

Foundry's submissions

24. In essence the Appellants' application for further and better particulars seeks to require HMRC to particularise the type of fraud which is alleged on the basis that "if an MTIC fraud is alleged then one set of inferences may be sought by [HMRC] and [Foundry] needs to be in a position to deal with a) the facts said to underly that assertion, and b) the inferences to be drawn from them." If however, the fraud alleged is a carousel fraud or an acquisition fraud apparently difference facts and inferences will need to be dealt with. Accordingly, "it is not asking too much" of HMRC to precisely particularise the nature of the scheme alleged. In the absence of a label being put on the type of fraud Foundry contend that they must be provided with sufficient understanding of how the alleged fraud is said to work.

25. By reference to the statement of case Foundry contends that HMRC have failed to show that there was an export/dispatch post the transaction with Foundry so as to indicate there is a "broker" company as would be required in an MTIC fraud. Neither has HMRC established in pleadings that the goods were, at any point, supplied from outside the UK such that an acquisition or MTIC fraud might be established. Nor is there a suggestion of a carousel fraud. Having excluded these variants of fraud it is, at least implicit, that Foundry is contending that there cannot have been a scheme to defraud at all and hence HMRC should be required to further particularise their case.

26. As is conventional in Kittel cases directions in this case include what is known as a Fairford direction. Such direction provides for Foundry to state whether they accept (without making any admission of knowledge or means of knowledge) that the transactions chains on which input tax has been denied "were part of an orchestrated overall scheme to defraud the revenue". Foundry contend that without the information as to the nature of the scheme they cannot comply with the Fairford direction.

27. Further, it was contended that Foundry would not be able to determine the evidence it needed to call without the particularisation sought. For instance, it was asserted that if they knew the alleged fraud was an MTIC fraud Foundry might call expert evidence regarding the market but that such evidence would not be necessary were an acquisition fraud alleged. Various further permutations of complexity in determining what evidence might be necessary were advanced to demonstrate why it was contended that particularisation was critical to fairness when facing Kittel assessments and associated penalties and liability notices which, I was reminded, are criminal notices for the purposes of Article 6(3)(a) European Convention on Human Rights. Particular reliance was placed on this feature of the case it being essentially contended that there was no material difference between a case in which dishonesty was asserted and one in which penalties (amounting to criminal sanctions) were issued.

28. Foundry contend that the information they seek is reasonably necessary and proportionate to enable them to prepare their own case and/or understand the case that they need to meet. This, they contend, rule 5(3) FTT Rules should be interpreted in an way which is consistent with that provided for in Practice Direction 18 to CPR rule 1.2 and by reference to the case law regarding further and better particulars under the CPR. In this regard Foundry referenced Lord Millet's judgment in *Three Rivers District Council v Bank of England* [2001] UKHL 16 [184] – [186] as justifying the application on the basis that an allegation of fraud must be distinctly alleged and distinctly proven requiring therefore that it must be sufficiently particularised.

29. I was taken to the judgments in *Gamatronic (UK) Ltd v Hamilton and others* [2012] EWHC 3287, *Portland Stone Firms Ltd v Barclays Bank Plc and others* [2018] EWHC 2341 as reinforcing the imperative that a the case where dishonesty or comparable impropriety is alleged it is for HMRC and not Foundry to lay out the allegations clearly. And by reference to similar Kittel cases that the Court of Appeal had clearly required in *HMRC v Citibank NA and another* [2017] EWCA Civ 1416 and *Davis and Dann v HMRC* [2016] EWCA Civ 142 for proper particulars of the frauds to be pleaded. This was so even where the fraud (as here) is not alleged against the taxpayer facing the Kittel assessments.

30. Reliance was placed on the judgment of the Tribunal in *Ronald Hull v HMRC* [2016] UKFTT 525 (TC) in which the Tribunal had directed HMRC to provide further and better particulars as to how "the alleged contrived scheme was supposed to work" so that the appellant in that case knew what was alleged against it.

31. Mr Watkinson, for Foundry, submitted that HMRC had made a rod for their own back by pleading an "overall scheme". He indicated that had the case been pleaded only on the basis of Kittel then HMRC would not have been required to particularise any underlying fraud. He invited, as an alternative to his application for further and better particulars, that HMRC simply withdraw the allegation of overall scheme, but it was not appropriate to "leave the door open" and not plead it adequately.

HMRC's submissions

32. HMRC contend that there is no requirement on them to particularise the statement of case further. They contend that Foundry's application is, in essence, an attempt to reframe the Kittel test which simply provides that HMRC may deny input tax recovery where: "it is ascertained, having regard to objective factors, that the person *knew or should have known* that, by his purchase, he was participating in a transaction concerned with the fraudulent evasion of VAT". As determined in paragraph [59] in *Mobilix Ltd (in administration and others v HMRC* [2010] EWCA Civ 517:

> "The test in *Kittel* is simple and should not be over-refined. It embraces not only those who know of the connection but those who "should have known". Thus it includes those who should have known from the circumstances which surround the transaction that they are connected to fraudulent evasion. If the trader should have known that the only reasonable explanation for the transaction in which he was involved was that it was connected with fraud and if it turns out that the transactions was connected with fraudulent evasion of VAT then he should have known of that fact. He may properly be regarded as a participant for the reasons explained in *Kittel*."

33. It was acknowledged by Mr Hayhurst that the Kittel test did not require any scheme of fraud to be alleged only that a tax loss be proven. It was surmised by Mr Hayhurst that the practice of pleading some scheme (including an overall scheme without particularisation of its nature) was likely derived from the judgment of Christopher Clarke J in *Red12 v HMRC* [2009] EWHC 2563 (as recorded in *Mobilix*) in which he stated:

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

34. HMRC contend that all that is said to be meant by "overall scheme" is that there a pattern of similarities in what may be hundreds of transactions with a limited number of sources but through a large number of counterparties and that the pattern and the relationships are sufficient to indicate that the tax loss was fraudulent. The present statement of case, certainly as further particularised in Annex A, sets out the nature of the patterns and connections on which HMRC's case is founded.

35. It was submitted that in a case, where, as here, tax loss has been established in circumstances where there is a sufficient pattern of behaviour to be satisfied that the Kittel test is met so as to deny input tax to Foundry, that is sufficient. HMRC may not know the precise nature of the fraud, but they do not need to. Tax loss plus pattern and connections is sufficient and where their case is founded only on tax loss and patterns and connections, that

is all that needs to be pleaded. As confirmed in *Mobilix* paragraph [62] as the fraudulent transaction may arise upstream or downstream from the taxpayer facing a Kittel assessment the nature of the scheme is ultimately irrelevant.

36. In essence, it was contended `that the nomenclature of "overall scheme" means "we do not know the precise fraud perpetrated but we know that there has been tax loss, and the patterns and connections indicate the tax loss arose from fraudulent activity of which the taxpayer who has been assessed knew of should have known."

37. Mr Hayhurst sought to demonstrate that section B.9 of the statement of case, including the annexes referenced to in that section, sufficiently particularise the primary facts on which the overall scheme alleged i.e. that there has been tax loss and the patterns and connections which demonstrate such tax loss to be as a result of fraudulent conduct of which Foundry was or should have been aware. Sufficient detail being given of the pattern to meet any requirement that Foundry understand the allegations against it. To the extent necessary further particularisation in Annex A is sufficient.

38. It was readily acknowledged that where HMRC had sufficient information to particularise the nature of the fraud they will (and should) so particularise it. But where that information is not yet available, there is no requirement to wait until it is (which might result in tax falling out of time) in order to facilitate what Foundry contend would be a sufficient pleading. In such cases "overall scheme" with particularisation of the relevant pattern is enough.

Discussion

39. Having carefully considered the submissions of both parties I consider that those made by Mr Watkinson with much energy and force have no substantive foundation in the case law. As HMRC noted the highwater point for Foundry's case is *Ronald Hull* a case which is not binding on me and which, in any event, is to be distinguished factually because in that case HMRC alleged that the taxpayer was a complicit participant in the fraud itself and not "simply" that it knew or should have known of the existence of the relevant fraud.

40. I am satisfied, in particular by reference to an analysis of *Mobilix,* and as acknowledged by Mr Watkinson, that knowledge (by either HMRC or the taxpayer) as to the nature of the fraud is not a necessary component of a Kittel assessment. I accept, in full, HMRC's submission that provided that they can show that there is a tax loss and that by reference to all the facts and circumstances that loss arise from dishonest conduct somewhere in the chain (determined by reference to the patterns and connections such as those identified in paragraph [10.] above i.e. including the improbability of co-incidence, repeated pattern of being supplies by traders who then go on to be de-registered, the trading model and environment etc.) and that the relevant taxpayer knew or should have known of the fraud the case for a Kittel assessment will have been made out.

41. In *Hull* Judge Mosedale undertook a careful review of the terms on which a Kittel case was required to be pleaded. I agree her analysis. The primary facts underpinning the assessment must be adequately pleaded. But that does not require all facts to be pleaded.

42. I note that in relation to pleadings for fraud in respect of third parties Judge Mosedale said at paragraph [34]:

> "… where a third party's alleged fraud is a primary fact alleged against a party to an appeal, it must be leaded with sufficient details to justify it, but it does not itself have to be pleaded in the same degree of detail as it would need to be pleased if the non-party were a party to the case. The SOC does

> not have to contain a full SOC for every non-party alleged to have committed fraud. The details can wait for exchange of evidence."

43. Here HMRC have set out the primary facts on which they contend that there was a tax loss, the patterns and connections which indicate: 1) that the tax loss arise as a consequence of fraud and, 2) by reference to the participation of Foundry why it is asserted that they knew or should have known that the transaction in connection with which input tax was claimed were connected with such fraud.

44. Paragraphs 110 – 111 of *Ronald Hull* relied upon by Foundry concern allegations in the statement of case in that matter alleging that transactions from two non-parties through two others were part of a contrived scheme and that "all participants in the scheme including the appellant knew its place in the fraud" (emphasis added). In such circumstances it was necessary for HMRC to more fully explain how the contrived scheme was to work. Drawing a comparison or analogy to the present case is not, in my view, appropriate where here, the allegation made is only that the Foundry knew or should have known of the frauds in the transaction chains.

45. That is so despite the ECHR treatment of the penalties imposed. There is no actual allegation of dishonesty, indeed dishonesty on the part of Foundry has been expressly avowed. If HMRC cannot, by evidence, meet the burden of proof and make out their case then it will fail. Kittel cases are not uniformly successful. In each case, the Tribunal listed to hear the matter will carefully consider all the evidence and whether HMRC have shown, on the balance of probabilities, that there was fraudulent tax loss of which the taxpayer knew or should have known. That is precisely what will happen in this appeal in due course. Somewhat obviously, if HMRC cannot prove their case the assessments to tax, the penalties and liability notifications will fail. In those circumstances I do not consider the fact that penalties have been issued to make a difference.

46. The Appellants have been provided with sufficient information (in Annex J to the statement of case) of the parties in the relevant supply chains generating the tax loss. Similarly they have sufficient information as to what HMRC allege as the patterns and connections on which they found firstly the allegation that the tax loss is fraudulent and secondly the contention that Foundry knew of should have known of the relevant VAT frauds (in the statement of case section B.9 and by reference to Annex A). The particularisation provides a sufficient understanding of the basis on which the Kittel assessments have been raised and no further particularisation is required.

47. I therefore refuse the Appellants application for further and better particulars.

CONSEQUENTIAL DIRECTIONS

48. I was not provided with copies of any tribunal directions made in respect of the future case management of the consolidated appeals. I assume that, as yet, none have been made. Accordingly, the parties are to agree relevant directions in similar form to the Tribunal standard form for Kittel cases and provide the Tribunal with such directions no later than 5pm 30 days from the released of this judgment.

RIGHT TO APPLY FOR PERMISSION TO APPEAL

49. This document contains full findings of fact and reasons for the preliminary decision. Any party dissatisfied with this preliminary 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.

AMANDA BROWN KC
TRIBUNAL JUDGE
Release date: 25th JULY 2023