Neutral Citation: [2024] UKFTT 1066 (TC)

Case Number: TC09361

FIRST-TIER TRIBUNAL
TAX CHAMBER

[By remote video hearing]

Appeal references: TC/2019/00056

PROCEDURE – Application to Debar – prospects of success – Mediability Limited v HMRC considered – whether a preliminary issue – no – Application refused – Application for specific disclosure – whether burden of proof discharged – no – Application refused – Directions to follow

Heard on: 5 December 2023
Judgment date: 27 November 2024

Before

TRIBUNAL JUDGE ANNE SCOTT

Between

VNS WASTE SOLUTIONS LIMITED

Appellant

and

THE COMMISSIONERS FOR HIS MAJESTY'S REVENUE AND CUSTOMS

Respondents

Representation:

For the Appellant: Michael Firth, of Counsel, instructed by The Khan Partnership LLP

For the Respondents: Jenny Goldring and Aparna Rao of counsel, instructed by the General Counsel and Solicitor to HM Revenue and Customs

DECISION

INTRODUCTION

1. This was a case management hearing listed to hear two Applications made by the appellant, namely:

(1) An Application to Debar dated 9 October 2023 as amended on 22 November 2023;

and

(2) An Application for Specific Disclosure dated 6 November 2023, ie a request to direct HMRC to disclose unredacted copies of certain identified bank statements.

2. With the consent of the parties, the hearing was conducted by video link using the Tribunal's video hearing system. 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.

3. The documents to which I was referred for this hearing comprised an amended Hearing Bundle consisting of 634 pages and an Authorities Bundle extending to 349 pages. I had Skeleton Arguments for both parties. I also had an updated chronology of the proceedings up until 4 December 2023.

4. Unfortunately, partly because of illness in early 2024, but primarily as the result of an accident which triggered a protracted period of sick leave, this decision has been very delayed. That is particularly unfortunate given the historical delays in this appeal. It was I who had sought this expedited Case Management Hearing in order to minimise delay.

Procedural history

5. By way of a Notice of Appeal dated 20 December 2018, the appellant appealed the respondent's ("HMRC's") decision dated 26 November 2018 deregistering the appellant for VAT with effect from 1 August 2017 ("the Registration Appeal"). That decision had been taken by HMRC on the basis that HMRC has concluded that the appellant was using its VAT registration solely or principally for fraudulent purposes.

6. On the same day, the appellant also appealed HMRC's decision dated 26 November 2018 refusing the appellant the right to deduct input tax of £1,818,418 in its VAT accounting periods 12/16, 03/17 and 06/17 ("the Input Tax Appeal"). On the same date, HMRC had raised an assessment in that sum which, together with interest, totalled £1,832,057.22. That assessment was issued on 6 December 2018 and the appellant's appeal also encompasses the assessment.

7. The basis for the assessment was denial of the appellant's right to deduct input tax in respect of 29 transactions relating to the removal of waste from a site in Warrington between October 2017 and June 2018. HMRC asserted that the transactions were connected with a fraudulent tax loss and that the appellant knew or should have known that.

8. On 22 March 2019, HMRC lodged a joint application for the appeals to be joined together for the purposes of case management and to be allocated as Complex. Although, it was allocated as Standard on an interim basis, that application was subsequently granted.

9. On 15 July 2019, HMRC lodged their Statement of Case and that was subsequently amended on 3 January 2020. HMRC's witness statements were also served on that date.

10. On 31 January 2020, the appellant lodged amended Grounds of Appeal. On the same day, Judge Popplewell issued Directions *inter alia* directing the appellant to lodge supplemental witness evidence by 28 February 2020. Correspondence ensued with the appellant seeking

disclosure before lodging the witness evidence. HMRC consented to an extension of time to 14 April 2020. HMRC lodged supplementary witness statements on 13 March 2020. Further extensions of time were granted to the appellant until after a Case Management hearing to be listed for 7 December 2020.

11. On 23 November 2020, the appellant lodged an Application for Specific Disclosure of bank statements and purchase invoices held by HMRC (the "Original Application"). Those documents were held as part of an ongoing criminal investigation. That was opposed by HMRC.

12. Judge Citron held the Case Management hearing on 7 December 2020. During that hearing, HMRC intimated that, should disclosure be ordered, they may need to seek a stay of the appeal to avoid disclosure jeopardising a parallel criminal investigation, and on 15 December 2020 and thereafter he issued Directions. That hearing also considered the parties' arguments as to whether HMRC bore the burden of proof on the alternative argument that they intended to advance to the effect that there had been no supply made by the appellant.

13. On 15 December 2020, Judge Citron issued Directions which included a Direction to HMRC to lodge with the Tribunal and the appellant:

> "(1) written submissions as to whether their probable response to an order by the Tribunal to produce the documents requested by the appellant in its application dated 23 November 2020 (such response being based on HMRC's views of the effect of such an order on their criminal investigation), should be taken into account by the Tribunal in deciding whether to make such an order; and
>
> (2) such information in writing as to what their probable response to such an order would be, as they can reasonably provide (and, if applicable, explanation as to why they feel unable to provide such information in full).
>
> The respondents' responses should explain any relevant distinction between the documents that would be produced under such an order by the Tribunal and any similar documents already in the parties' lists of documents, such as bank account statements for earlier periods of time."

14. There was also a Direction extending the time for the appellant to lodge the witness evidence to no later than six weeks from the later of (a) the date of issue of the Tribunal's decision notice regarding the burden of proof on the no supply issue, and (b) compliance by HMRC with any order to produce the documents sought in the Original Application.

15. On 29 January 2021, HMRC lodged that response. In summary that said that:

> (1) Disclosure would adversely impact the criminal investigation. At that stage, no decision had been made as to what information would be used as evidence in the criminal case. There was concern that material could fall into the hands of persons potentially connected with the suspects. Because of that, as far as the bank statements were concerned, if disclosure were to be ordered then they should be redacted to show only the appellant's transactions. Third party transactions could not be disclosed.
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> (2) The appellant had failed to show how disclosure might "advance or hinder a party's case".
>
> (3) The material is not relevant to the issues for determination by the Tribunal.
>
> (4) Disclosure of the invoices would be disproportionate.
>
> (5) If disclosure were to be ordered, HMRC were likely to seek a stay pending a charging decision.

16. On the same day, HMRC lodged a Further Amended Statement of Case. That made it clear that the decision, and consequent assessment, in the Input Tax Appeal, had been made on the basis that input tax arising on supplies is not allowable under the principles in *Axel Kittel v Belgium State, Belgium State v Recolta Recycling SPRL* C-439/04 and C-440/04 ("Kittel"), ie the appellant knew or should have known that the supplies were connected with the fraudulent evasion of VAT. That was, and had been, HMRC's primary case.

17. However, HMRC argued that, in line with paragraphs 43 to 48 of *HMRC v BUPA Purchasing Ltd and Others* [2007] EWCA Civ 542 ("BUPA"), they were permitted to alter the reasoning behind that assessment and add an alternative case.

18. That alternative case was to the effect that, VAT invoices are not determinative of whether or not a taxpayer has the right to deduct the input tax shown on the invoice or whether there had been a taxable supply. Although the appellant held what purported to be VAT invoices, taxable supplies did not take place between 24 October 2016 and 28 June 2017.

19. That alternative argument (the "No Supply" case) was articulated as follows:

> "NO SUPPLY
>
> 171. As stated above the alternative case is that there were in fact no supplies.
>
> 172. In support of this scenario, it is not clear how if these were genuine multiple waste transactions, how they were conducted by a sole director with no employees. The apparent speed with which the deals were undertaken suggests that nothing happened in reality and that the deals in fact (sic) a paper exercise.
>
> 173. The Appellant has provided waste tickets showing (sic) in support of its transactions which have been confirmed to be false by Veolia. Veolia have confirmed that the waste tickets are not genuine and that they do not have any kind of relationship with the Appellant, CSC, T Davies or Chip Logistics.
>
> 174. Finally, an analysis of the Appellant's movement of waste figures provided, suggests that the results are both extraordinary and unachievable, even more so, from a company who has little to no knowledge in the waste industry trade sector".

20. On 16 March 2021, Judge Citron issued his decision on the preliminary issue ("VNS1") which was the question as to where the burden of proof lies in respect of HMRC's alternative case on input tax, ie the "No Supply" argument.

21. I set out the full text at paragraph 72 below, but in summary, at paragraph 16(3)(b), Judge Citron noted that much of the evidence would be relevant to both the *Kittel* and the alternative "No Supply" case and found that "…the Tribunal will undoubtedly wish to hear argument and evidence on both cases before making a decision on either….".

22. He found at paragraph 17 that:

> "I do not therefore consider that there would be unfairness to the appellant in the Tribunal hearing both the *Kittel* and the 'no supply' case in a single hearing; and the burden of proof in those cases will follow the established law, namely that the burden falls on HMRC in respect of the *Kittel* case, and on the appellant in respect of the 'no supply' case …".

23. On 30 March 2021, the appellant lodged its response to HMRC's submissions on disclosure. At paragraph 7, it argued that:

> "7. The Appellant maintains its request for bank statements. The bank statements will potentially demonstrate the relationship between T Davies and CSC and CSC and Chip Logistics and the flows of money between these parties. That will assist the Appellant's case. If there are irrelevant third-party payments then such material can be redacted but

if the Respondent is aware that third party payments form part of a carousel as alleged by VNS then such information should not be redacted."

24. On 16 April 2021, with neutral citation 2021 UKFTT 115 (TC) ("VNS2"), Judge Citron released his decision *inter alia* on the Original Application.

25. He summarised HMRC's submissions dated 29 January 2021. Having said that it was difficult to evaluate the risks of prejudicing the criminal investigation, at paragraph 36, his decision was to grant the Original Application subject to the caveat that "…HMRC will be permitted to redact documents to remove references to matters unrelated to the deal chains". He did so on the basis that he had stated at paragraphs 31 and 33 that he had formed the view that:

(a) "the Documents are relevant to, and potentially probative of, the circularity of the 29 deal chains as asserted by HMRC",

(b) the degree of potential relevance was high because

(i) the circularity of those deal chains was a pleaded fact in the case and the documents were potentially probative of that circularity,

(ii) nevertheless the documents might contain evidence against that circularity.

26. He stated that:

"The likely effect on the determination of this case of requiring disclosure of the Documents is in my view material: it may well confirm or undermine HMRC's case that all the deal chains were circular and cast meaningful light on the alleged fraud".

27. Directions were issued providing for Disclosure within eight weeks.

28. On 11 June 2021, HMRC made an application for a stay of the Directions for Disclosure for a period of 6 months

"...until the criminal investigation team completes their disclosure exercise in respect of the ongoing criminal investigation, Operation Manfield. The purpose of the stay is to enable the Respondents to fully comply with the directions for disclosure issued by Judge Zachary Citron on 16th April 2021 ("the Decision"). Although it is difficult to predict with any certainty, it is anticipated that the disclosure exercise will be completed in 6 months".

29. On 19 July 2021 the appellant's agents consented to the stay.

30. On 20 September 2021, Judge Citron granted that application until 11 December 2021. He extended the time limit for complying with the earlier Directions to the same date and extended the time limit to appeal *VNS2* by four weeks from 20 September 2021.

31. No appeal was lodged.

32. On 13 December 2021, HMRC complied with the Directions, provided the appellant with redacted copy bank statements and confirmed that they did not possess certain purchase invoices.

33. On 19 January 2022, the parties agreed a Consent Order allowing the appellant to serve supplementary witness evidence by 7 March 2022 and, on 17 February 2022, the Tribunal agreed thereto.

34. In terms of Directions issued by the Tribunal dated 22 March 2022, HMRC were directed to serve a supplementary witness statement by 1 April 2022 and the appellant was directed to serve their supplementary witness evidence by 13 May 2022.

35. HMRC's supplementary witness statement was served timeously on 1 April 2022. It exhibited the bank statements in a significantly different format from the statements previously disclosed on 13 December 2021 and provided witness commentary and analysis.

36. Following correspondence, of consent, on 13 May 2022, it was directed that the appellant should serve their supplementary witness evidence by 10 June 2022.

37. On 10 June 2022, the appellant lodged an application for a stay ("the Stay Application") of the proceedings and all other Directions. The appellant argued that the ongoing criminal investigation meant that HMRC could not provide unredacted bank statements to the appellant and without those the appellant could not "identify the circularity of funds and where there was a tax loss".

38. It was argued that the appellant was the victim of a sophisticated fraud and was disadvantaged because criminal investigations had precluded it from having full access to the documents necessary to prove its case before the Tribunal.

39. On 1 July 2022, HMRC served their response to that Stay Application. They argued that:

(a) The bank statements had been "necessarily" redacted to remove data about transactions that were not relevant to the supply chains in the case; the Directions dated 16 April 2021 had stated that there could be redaction to remove references unrelated to the deal chains of supply.

(b) They accepted that there were some errors in the third witness statement of Mr Bell but stated that those were not caused by the redaction of the bank statements. The witness, Mr Bell, had prepared a correction witness statement in which the errors were set out and the correct figures introduced.

(c) HMRC accepted that the redacted bank statements provided on 13 December 2021 mistakenly redacted some payments that were relevant to the supply chains and they proposed correcting those mistakes and intimated that they would disclose corrected copies by 8 July 2022.

(d) This was the first time that the appellant had argued that it did not have all the necessary documentation in order to plead its case. The appellant had not complained upon receipt of the specific disclosure on 13 December 2021 and indeed had not lodged an appeal in relation to Judge Citron's permitted redaction dated 16 April 2021.

40. HMRC went on to make it explicit that their view was that:

> "The unredacted bank statements would not assist the Appellant, as movements of money between unconnected traders is irrelevant."

and that the appellant:

> "…presupposes that the bar to disclosure of unredacted material is the existence of an ongoing criminal investigation or proceedings. It is not. The bank statements would only be disclosed to the extent that their contents are relevant. The Appellant has not indicated why the movement of money between unconnected third parties would be disclosable in its case…..".

41. On 30 July 2022, following a hearing, Judge Rankin refused the Stay Application and directed that the witness statement be filed by the appellant.

42. On 7 October 2022 the appellant sought set aside of those Directions which appear only to have been issued on 30 September 2022.

43. On 7 December 2022, the Tribunal confirmed that Judge Rankin had set aside those Directions and asked parties for dates to avoid for a hearing in relation to the Stay Application. On 25 April 2023 a hearing was listed for 31 July 2023 but, on 31 May 2023, the parties made a joint application to vacate that hearing; that was granted on 22 June 2023.

44. On 7 June 2023, HMRC intimated to the two directors of the appellant that they did not propose to pursue criminal charges against them.

45. On 5 July 2023, HMRC wrote to the appellant seeking clarification as to whether the Stay Application was still being pursued and enquiring whether the appellant was now in a position to serve its supplementary evidence. There was no reply.

46. On 10 August 2023, HMRC again wrote to the appellant reiterating its queries and copied that letter to the Tribunal requesting a response within 14 days.

47. On 3 October 2023, the appellant's agent wrote to HMRC referring to the letter of 5 July 2023 stating that they were taking advice from counsel and would make a decision on the Stay Application by Thursday 5 October 2023.

48. On 6 October 2023, in response to a further prompt from HMRC, it was confirmed that the Stay Application would not be pursued.

49. On the same day, the appellant's agent wrote to HMRC:

(a) referring to the Stay Application,

(b) arguing that, in light of the decision not to proceed with the criminal investigation HMRC should provide a complete set of the unredacted bank statements,

(c) asking if HMRC would consent to disclose the documentation within 21 days,

(d) stating that if disclosure was not agreed it would then be the appellant's intention to make a further application for specific disclosure.

50. On 9 October 2023, the appellant lodged the Application to Debar HMRC from offering a defence to the appellant's input tax appeal. HMRC replied intimating that, given the timescale, they would be unable to respond to the request for disclosure or the Application to Debar before the case management hearing.

51. In the course of correspondence immediately before the hearing, the parties were unable to agree Directions.

52. There was a Case Management hearing on 13 October 2023 following upon which I issued a Decision and Directions. That Case Management hearing had been listed to hear the Stay Application but was not vacated. In the course of the hearing, the appellant intimated that a further hearing should be listed to hear the Application to Debar and that they should not be required to lodge the supplementary witness evidence before that was heard. In the course of the hearing, Mr Firth advanced oral arguments anent the need for specific disclosure.

53. My decision was that an expedited Case Management hearing should be listed because:

(1) I was not prepared to adjudicate on the oral application for specific disclosure at that hearing since HMRC had not had appropriate or timely notice thereof. No written Application to that effect had been lodged and *VNS2* had not been appealed. The appellant was directed to lodge a formal application, if so minded, by no later than 6 November 2023. That was lodged timeously.

(2) HMRC should be given time to consider the Application to Debar and if so minded to lodge a Response. HMRC was directed to lodge that with the Tribunal by 13 November 2023 and they did so.

(3) There was at that time still extant the Registration Appeal against HMRC's decision to deregister the appellant. The appellant was directed to confirm its stance in regard thereto.

That appeal was formally withdrawn on 6 November 2023 on the basis that the appellant was no longer in business and therefore the issue was academic.

54. On 15 November 2023, I issued Directions because there had been correspondence between the parties which had been copied to the Tribunal and I had observed that it raised a number of issues which should be canvassed in a hearing. Parties were granted leave to amend their respective Application to Debar and Response.

55. They did so and the Amended Application to Debar was lodged on 22 November 2023 and HMRC's Amended Response was lodged on 29 November 2023.

The Tribunal Rules

56. It is common ground that the Tribunal has the power to debar HMRC in terms of Rule 8 of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009 (as amended) ("the Rules") the relevant paragraphs of which read:-

"(3) The Tribunal may strike out the whole or a part of the proceedings if—

…

(c) the Tribunal considers there is no reasonable prospect of the appellant's case, or part of it, succeeding.

…

(7) This Rule applies to a respondent as it applies to an appellant except that—

(a) a reference to the striking out of the proceedings must be read as a reference to the barring of the respondent from taking further part in the proceedings; and

(b) a reference to an application for the reinstatement of proceedings which have been struck out must be read as a reference to an application for the lifting of the bar on the respondent taking further part in the proceedings.

(8) If a respondent has been barred from taking further part in proceedings under this rule and that bar has not been lifted, the Tribunal need not consider any response or other submissions made by that respondent, and may summarily determine any or all issues against that respondent".

57. At all times I must have regard to the Overriding objective and that is to be found in Rule 2 of the Rules and reads:

"**2.—Overriding objective and parties' obligations to co-operate with the Tribunal**

(1) The overriding objective of these Rules is to enable the Tribunal to deal with cases fairly and justly.

(2) Dealing with a case fairly and justly includes—

(a) dealing with the case in ways which are proportionate to the importance of the case, the complexity of the issues, the anticipated costs and the resources of the parties;

(b) avoiding unnecessary formality and seeking flexibility in the proceedings;

(c) ensuring, so far as practicable, that the parties are able to participate fully in the proceedings;

(d) using any special expertise of the Tribunal effectively; and
(e) avoiding delay, so far as compatible with proper consideration of the issues.

(3) The Tribunal must seek to give effect to the overriding objective when it—

(a) exercises any power under these Rules; or
(b) interprets any rule or practice direction.

(4) Parties must—

(a) help the Tribunal to further the overriding objective; and
(b) co-operate with the Tribunal generally."

58. HMRC argues that Rule 8 of the Rules should be read in conjunction with Rule 5(3)(e) of the Rules which reads:

"(3) In particular, and without restricting the general powers in paragraphs (1) and (2), the Tribunal may by direction –

…

(e) deal with an issue in the proceedings as a preliminary issue".

The Application to Debar

59. The Application to Debar HMRC from defending the appeal against the assessment and to allow the appeal against the assessment summarily was on the ground that HMRC had no reasonable prospect of succeeding.

60. As the Upper Tribunal pointed out in *Infinity Distribution Ltd (in administration) v HMRC* [2019] UKUT 0405 (TCC) ("Infinity") at paragraph 11 such an Application involves two questions. The first question is whether or not HMRC's case has a reasonable prospect of succeeding; and if it does not, whether HMRC should be barred from taking part in the appeal. The second question, which would only arise if I decide that HMRC should be barred, is whether I should exercise my discretion to determine the appeal summarily against HMRC.

61. It is common ground that Judge McNall in *Mediability Limited v HMRC* [2023] UKFTT 315 (TC) ("Mediability") had set out the relevant principles to be applied in relation to the prospect of success under the heading "The Test for Prospects" he stated that:

"32. In this regard, I am guided by the detailed statement of principles set out by Lewison J (as he then was) in *Easyair Ltd v Opal Telecom Ltd* [2009] EWHC 339 (Ch) at [15], which was endorsed by the Tax and Chancery Chamber of the Upper Tribunal (Henry Carr J and Upper Tribunal Judge Sinfield) in *The First De Sales Ltd Partnership and others v Revenue and Customs Commissioners* [2018] UKUT 396 (TCC) at Para [33]:

'(i) The court must consider whether the claimant has a 'realistic' as opposed to a 'fanciful' prospect of success: *Swain v Hillman* [2001] 1 All ER 91

(ii) A 'realistic' claim is one that carries some degree of conviction. This means a claim that is more than merely arguable: *ED & F Man Liquid Products v Patel* [2003] EWCA Civ 472 at [8]

(iii) In reaching its conclusion the court must not conduct a 'mini-trial': *Swain v Hillman*

(iv) This does not mean that the court must take at face value and without analysis everything that a claimant says in his statements before the court. In some cases it may be clear that there is no real substance in factual assertions made, particularly if contradicted by contemporaneous documents: *ED & F Man Liquid Products v Patel* at [10];

(v) However, in reaching its conclusion the court must take into account not only the evidence actually placed before it on the application for summary judgment, but also the evidence that can reasonably be expected to be available at trial: *Royal Brompton Hospital NHS Trust v Hammond (No 5)* [2001] EWCA Civ 550;

(vi) Although a case may turn out at trial not to be really complicated, it does not follow that it should be decided without the fuller investigation into the facts at trial than is possible or permissible on summary judgment. Thus the court should hesitate about making a final decision without a trial, even where there is no obvious conflict of fact at the time of the application, where reasonable grounds exist for believing that a fuller investigation into the facts of the case would add to or alter the evidence available to a trial judge and so affect the outcome of the case: *Doncaster Pharmaceuticals Group Ltd v Bolton Pharmaceutical Co 100 Ltd* [2007] FSR 63;

(vii) On the other hand it is not uncommon for an application under Part 24 to give rise to a short point of law or construction and, if the court is satisfied that it has before it all the evidence necessary for the proper determination of the question and that the parties have had an adequate opportunity to address it in argument, it should grasp the nettle and decide it. The reason is quite simple: if the respondent's case is bad in law, he will in truth have no real prospect of succeeding on his claim or successfully defending the claim against him, as the case may be. Similarly, if the applicant's case is bad in law, the sooner that is determined, the better. If it is possible to show by evidence that although material in the form of documents or oral evidence that would put the documents in another light is not currently before the court, such material is likely to exist and can be expected to be available at trial, it would be wrong to give summary judgment because there would be a real, as opposed to a fanciful, prospect of success. However, it is not enough simply to argue that the case should be allowed to go to trial because something may turn up which would have a bearing on the question of construction: *ICI Chemicals & Polymers Ltd v TTE Training Ltd* [2007] EWCA Civ 725.'

33. In essence, HMRC argues that these appeals cannot survive the strike-out application because the totality of the presently available evidence, looked at as a whole, shows that the Appellant does not enjoy any realistic prospect of successfully advancing these appeals."

62. In addition, both parties relied on the Upper Tribunal in *HMRC v Fairford Group PLC & Another* [2014] UKUT 0329 (TCC) where Mr Justice Simon and Judge Bishopp stated at paragraph 41:

"In our judgement an application to strike out in the FTT under Rule 8(3)(c) should be considered in a similar way to an application under CPR 3.4 in civil proceedings (whilst recognising that there is no equivalent jurisdiction in the First-tier Tribunal Rules to summary judgement under part 24). The Tribunal must consider whether there is a realistic, as opposed to a fanciful (in the sense of it being entirely without substance) prospect of succeeding on the issue at a full hearing, see *Swain v Hillman* [2001] 2 All ER 91 and *Three Rivers* (see above) Lord Hope at [95]. A realistic prospect of success is one that carries some degree of conviction and not one that is merely arguable, see *ED*

& F Mann Liquid Products v Patel [2003] EWCA Civ 472. The Tribunal must avoid conducting a 'mini trial'. As Lord Hope observed in *Three Rivers*, the strike out procedure is to deal with cases that are not fit for a full hearing at all."

63. HMRC also relied upon Lord Hope's statement at paragraph 9 in *Boyle v SCA Packaging* [2009] UKHL 37 that:

> "[9] It has often been said that the power that tribunals have to deal with issues separately at a preliminary hearing should be exercised with caution and resorted to only sparingly…The essential criterion for deciding whether or not to hold a pre-hearing is whether…there is a succinct, knockout point which is capable of being decided after only a relatively short hearing. This is unlikely to be the case where a preliminary issue cannot be entirely divorced from the merits of the case, or the issue will require the consideration of a substantial body of evidence."

64. HMRC argue that reading those cases together with Rules 2, 5 and 8 of the Rules, the Tribunal has a discretion as to whether an application such as this is considered as a preliminary issue or included in the substantive hearing. Their case is that it requires a full hearing since the No Supply case cannot be considered in isolation. The appellant's argument

65. It was argued for the appellant that:

(1) HMRC's pleaded case was that there was no supply.

(2) Reliance was placed on Mr Justice Picken in *Arcelormittal North America Holdings LLC v Ruia & Others* [2022] EWHC 1378 (Comm) ("Arcelormittal") at paragraph 29 where he stated:-

> "As to strike-out applications, under CPR 3.4(2)(a), the Court may strike out a statement of case if it appears that it discloses no reasonable grounds for bringing the claim. When considering an application to strike out, the facts pleaded must be assumed to be true and evidence regarding the claims advanced in the statement of case is inadmissible (*King* at [27]; and *Allsop v Banner Jones Limited* [2021] EWCA Civ 7 at [7]); consideration of the application will be 'confined to the coherence and validity of the claim as pleaded' (*Josiya v British American Tobacco PLC* [2021] EWHC 1743 (QB))."

(3) On the basis that those pleaded facts are assumed to be true, it therefore follows that the appellant can have no liability to output tax since VAT is charged on supplies.

(4) If there was no liability to output tax, the VAT returns in each period were overstated as they should have shown no liability to output VAT.

(5) The reduction in output tax is greater than the input tax HMRC are seeking to disallow, so the overall result is that there is no net amount of VAT due to HMRC.

(6) Accordingly, the assessment must be discharged.

(7) In any event, it is irrational for HMRC to argue on the one hand that there was no supply and on the other hand that there was a supply. HMRC do not have a coherent or sustainable case to take forward to a substantive hearing, ie a case that succeeds in the absence of anything presented by the appellant.

66. The appellant has not framed the Application as a preliminary issue and at the outset of the hearing Mr Firth stated that the appellant was not asking the Tribunal to treat the application as such. I say that because, although HMRC argue that the Application to Debar is not suitable to be treated as a preliminary issue, their stance is that the Tribunal has the power, in terms of

Rule 5(3)(e) of the Rules to direct that an issue be dealt with as a preliminary issue. They accept that there is no requirement that an application under Rule 8 must be heard as a preliminary issue but they concede that it may be appropriate to do so on occasion in accordance with the principles set out in *Wrottesley v HMRC* [2015] UKUT 637 (TCC) ("Wrottesley"). In their response to the Application to Debar they set out paragraph 28 of *Wrottesley* in full. It reads:

> "28. 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.
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> (6) The possibility that determination of the preliminary issue may result in there being no need for a further hearing should be considered.
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> (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."

67. As far as the question of a preliminary issue is concerned, HMRC argue that:-

(1) That guidance does not assume that an application to debar, or strike out, must be a preliminary issue but rather that the assessment should be case specific and all the relevant factors should be weighed in the balance.

(2) The power to determine an issue as a preliminary issue should be exercised with caution and used sparingly.

(3) The Application to Debar is misconceived and is not suitable for determination as a preliminary issue.

68. By contrast, the appellant argues that there is no preliminary issue within Rule 5(3)(e) of the Rules. Their argument is that:

(a) A preliminary issue only arises where parties have competing cases on a point of law or fact and where it would be efficient to single out that issue for early determination.

(b) *Wrottesley* sets out the nature of a preliminary issue which is, in terms of paragraph 2 thereof, "a discrete issue for which the limited relevant evidence is already prepared, and that resolution of it would both facilitate preparation for and the hearing of the rest of the case and could mean that the remainder of the case would not need to be heard".

(c) In this instance there is no dispute as to the law and the appellant is not seeking a determination on any factual question because the Tribunal should assume that HMRC's pleaded facts (and there are many in relation to the No Supply case) are correct.

(d) Since it is common ground that if there was no supply, there is no VAT and therefore an assessment cannot be charged, HMRC have no coherent or sustainable case. That is predicated on the argument that the burden of proof on No Supply lies with the appellant so, if the appellant calls no evidence, there will be no evidence of a supply. In their view, that is the key issue for the Tribunal.

69. In that latter regard, the appellant relied upon and quoted paragraph 47 of the Upper Tribunal decision in *Infinity* where Mr Justice Smith and Judge Scott stated that: -

> "47. It is important to appreciate that the *Kittel* jurisdiction pertains where a taxable supply has already been established or is not contested. *Kittel* holds that in such a case, provided the taxable person knew or should have known that, in purchasing goods, he was taking part in a transaction connected with the fraudulent evasion of VAT, that person loses the right to deduct input tax that he otherwise would have".

70. Mr Firth's argument was that it was authority for the proposition that *Kittel* only applies if there was a supply and therefore "of necessity" any question of whether or not there was a supply must be resolved before the Tribunal looks at the *Kittel* argument; it would be inherently illogical to approach *Kittel* first and then the No Supply case.

71. However, I observe that in *VNS1,* Judge Citron quoted that paragraph (and the preceding paragraph) when considering where the burden of proof lay as regards the No Suppply case. He pointed out that the appellant's then QC had submitted that whilst the authorities indicated that the burden of proof fell on the taxpayer in a No Supply case, the authorities did not envisage a situation where HMRC advanced both a *Kittel* case and No Supply case in the alternative and where in his submission "the two cases were inextricably linked".

72. Judge Citron went on to say at paragraph 16(b) that:

> "I can see a theoretical case for organising the substantive hearing such that evidence relevant to the 'no supply' case was heard first, followed by evidence relevant to the *Kittel* case. The theoretical basis for this approach would be that (i) the 'no supply' issue, if decided in HMRC's favour would dispose of the case; and (ii) it would delineate what evidence was relevant to which case. However, because much of the evidence will be relevant to both cases, and the tribunal will undoubtedly wish to hear argument and evidence on both cases before making a decision on either, such an approach would seem to me impracticable and, if it involved repetition of the same evidence, inefficient. I'm satisfied that the tribunal will be able to assess the relevance of evidence to either of the cases, without the hearing being artificially structured in this way."

73. I think that the logical meaning of the first sentence in paragraph 47 of *Infinity* is that *Kittel* comes into play where either HMRC or the appellant has established that there is a supply, or the appellant does not contest the fact that there was a supply. That is consistent with Judge Citron's finding that it is for the appellant to prove that there was a supply. I do not take from his ruling any inference that HMRC thought that there was no supply.

74. Ms Goldring made it explicit that HMRC's primary case was, and always had been, that there was a supply (*Kittel*) and that they did not say that there was no supply. Although Mr Firth argued that the case was not relevant, and I disagree, the point is that, just as in *Microring Limited v HMRC* [2019] UKFTT 456 (TC) ("Microring"), in a substantive hearing there would be three possible findings:-

(1) There was a supply that was connected to fraud;

(2) There was a supply that was not connected to fraud;

(3) There was no supply.

75. At paragraph 40 in *Microring*, which involved a *Kittel* case and a no supply case, the Tribunal declined to make a direction that either party be debarred or struck out noting that "the nature of the supplies made, if any, will like the state of Schrödinger's cat, be established when the full box of facts and argument is opened and examined at the substantive hearing of this appeal".

76. Ms Goldring urged me to adopt that approach. In that context, I observe that at paragraph 18 in *VNS1* Judge Citron referred to *Network Euro v HMRC* [2011] UKFTT 255 which was another case where there was a *Kittel* case and a no supply case.

77. I say that because I do not accept that, in putting the two alternative cases in this appeal, HMRC have adopted an irrational approach, as the appellant argues. It is not only possible to argue these two alternative cases but also acceptable to do so; it could be argued that it is good practice.

78. I do not accept the argument at paragraphs 7 and 16 of the appellant's Skeleton Argument that HMRC have accepted that the question of whether there was a supply must be determined prior to determining whether the *Kittel* test is satisfied. It is very clear to me that they do not accept that.

79. I agree with Judge Citron that there is no necessity for the No Supply case to be considered first. His decision was not appealed and it was clearly envisaged by all concerned that the facts in the two cases are interlinked and probably inextricably so. I find that they are.

80. It has repeatedly been argued for the appellant in both the Application to Debar and the Skeleton Argument that "…this Tribunal is being asked to consider the viability of HMRC's case on the basis that the facts pleaded by HMRC are correct".

81. I find that HMRC's pleaded case is a "*Kittel* denial of input tax" **and** a "denial of input tax on the basis of no supply" in the alternative.

82. The corollary to that is that I do not accept the argument at paragraph 11 of the Skeleton Argument for the appellant that if the appellant were to do nothing in this appeal it will succeed. On the contrary, as Ms Goldring argues, HMRC have a realistic, and far from fanciful, prospect of success in the *Kittel* case in a substantive hearing even if the appellant does nothing. If the appellant does participate in such a hearing, then the appellant will have to address the issue of supply, or not. It has not yet lodged the supplemental witness evidence and there are obvious conflicts in the evidence and pleadings thus far lodged; hence HMRC's alternative cases which respond to that.

83. For example, Ms Goldring helpfully explained, at a high level, the reasoning behind HMRC's alternative cases and the link with the long-standing Direction to the appellant to provide supplemental witness evidence. On the one hand, paragraph 6 of the Amended Grounds of appeal states that the appellant admits the details of its sales and purchases; that suggests that they argue that there were supplies. On the other hand, the appellant's director's witness statement suggested that his role was as a broker/financier and that is consistent with paragraph 4 of the appellant's submissions for the Case Management hearing on 7 December 2020 where it said that it did not process waste but sub-contracted it; hence the no supply case.

84. It was for those reasons that Judge Citron had issued Directions to the appellant anent the provision of supplemental witness evidence (see paragraph 21 above). That witness evidence has still not been provided.

85. Lastly, for completeness, I have noted that HMRC have told the appellant that in the event that the Tribunal finds that there was no supply, and therefore the assessments would not be charged, they would seek to recover a debt to the Crown. The appellant rightly argues that that is not a matter before the Tribunal at this juncture. Beyond noting that the appellant does not accept that there is a debt to the Crown or that HMRC could collect such a debt and that HMRC therefore draw the inference from that, that the appellant would then be arguing that there were supplies, I have therefore disregarded the references thereto.

86. Both parties spent time and effort arguing whether this was a preliminary issue but it seemed that, in reality, the differences between the parties, albeit I have narrated them, were more apparent than real. Neither wished the No Supply case to be decided as a preliminary issue. Nor do I; it should not be.

87. It is not a discrete issue and as I have indicated at paragraph 72, Judge Citron found that it would be impracticable and inefficient to deal with it separately. Furthermore, as the appellant's previous QC argued before Judge Citron, the facts in the two cases are interlinked and both HMRC and I accept that.

88. I do understand that the appellant would argue that Judge Citron said that in a context where facts had to be proved, and the difference is, that no facts have to be proved in relation to the Application to Debar as the facts in HMRC's pleaded case are assumed to be true.

89. As can be seen, I have heard a number of diverse arguments. However, the appellant's case ultimately turns on the assertion that, effectively, the No Supply case takes precedence over the *Kittel* case and it being assumed that HMRC's pleaded case on No Supply would be assumed to be true and therefore proven. It is an ingenious argument but I do not accept that it is correct in law.

90. I accept, as does HMRC, that if the No Supply case were HMRC's only pleaded case the position would be different but it is not. I have found that:

(a) There is no reason why the No Supply case would have to be heard first.

(b) HMRC's pleaded case includes both *Kittel* and No Supply.

91. The assumption articulated in paragraph 29 of *Arcelormittal* applies in equal measure to pleadings relating to both the *Kittel* and No Supply cases. As I have indicated I find that, as pled, HMRC have realistic prospect of success in relation to *Kittel.*

92. For the reasons given the Application to Debar is not suitable for determination as a preliminary issue.

93. I agree with Judge Nicholl's approach in *Microring* and I adopt the same approach here. The reference to Schrödinger's cat is also apt in this appeal!

Decision of the Application to Debar

94. The Application is refused. It was predicated on the basis that HMRC's pleaded case, on its own terms, must fail. For the reasons given, I disagree.

The Application for Specific Disclosure

95. The Application was for unredacted bank statements of three parties in the deal chains being "CSC", "T Davies" and "Chip Logistics". It seems to be common ground that the bank statements had been obtained pursuant to the criminal investigation.

96. In regard to the current Application for Specific Disclosure, both parties referred to Judge Citron's decision in *VNS2*. At paragraph 36 he granted the application for disclosure of the bank statements and stated that "HMRC will be permitted to redact documents to remove references to matters unrelated to the deal chains."

97. The appellant argues that:

(a) HMRC's submission in respect of redaction "was based entirely" on the potential adverse consequences for the criminal investigation.

(b) It is not explicit on what basis Judge Cintron accepted any level of redaction but that the only sensible inference is that it was based on HMRC's concern about the criminal investigation. That criminal investigation has not been an issue since 7 June 2023.

(c) The Direction was

> "…not limited to the strict movements between identified deal chain participants, but, instead anything related to the deal chains. The eventual destination of money that passed through each deal chain is plainly related to the deal chain".

98. By contrast, HMRC argues that:

(a) The Application seeks to circumvent Judge Citron's Decision and to relitigate the issues decided therein, without having appealed that Decision; the Application is largely in the same terms as the Original Application.

(b) The appellant misconstrues the reasons for redaction which was not to avoid adverse consequences for the criminal investigation but rather to avoid the inclusion of "irrelevant material".

(c) The appellant has not explained why disclosure of third party transactions (unrelated to the deal chains) are relevant or disclosable.

99. Firstly, of course, HMRC's written submissions for the Case Management hearing on 7 December 2020 focussed on the criminal investigation because that is what the Directions to which they were responding had required. That is not the whole story.

100. I have narrated at paragraphs 24 and 25 Judge Citron's explanation of his Decision. Obviously the criminal investigation had been a factor but it is clear that he had rejected HMRC's argument on relevance on the basis that the documents were relevant to the deal chains.

101. Furthermore, as can be seen from the following paragraphs, HMRC sought and was granted, a stay of proceedings because of the criminal investigation but by 13 December 2021, that was no longer an issue for HMRC and they provided the redacted bank statements. At no stage until the appellant lodged the Stay Application on 10 June 2022, being the date by which they should have lodged the further witness evidence, did the appellant advance an argument that they required unredacted bank statements.

102. The Stay Application, which was not pursued, said that:

> "It will assist the Appellant's case on the issue of whether it knew or ought to have known, to demonstrate how the funding it provided was used by its counterparties. With the benefit of the limited disclosure provided it is the Appellant's belief that its funds were used effectively in a carousel to gain it's (sic) the Appellant's confidence before dissipation by the counterparties".

103. That is restated in almost identical terms at paragraph 5 of the Application for Specific Disclosure.

104. In their response to the Stay Application (see paragraph 39 above) HMRC had pointed out that unredacted bank statements would not assist as movements of money between unconnected traders was irrelevant. That has not been addressed in the Application for Specific Disclosure.

105. At paragraph 22 above, I have narrated the appellant's concession in its submissions for the 7 December 2020 Case Management hearing to the effect that:

> "If there are irrelevant third-party payments then such material can be redacted but if the Respondent is aware that third party payments form part of a carousel as alleged by VNS then such information should not be redacted."

106. Judge Citron's Decision limited the disclosure to the deal chains and stated that otherwise it should be redacted. HMRC state that their witness can speak to the bank statements and what was, or was not, in the deal chains.

107. The appellant's stated rationale for this disclosure is vague. Like HMRC, I do not understand the contention that its own funds were used to gain its own confidence. The appellant has the unredacted bank statements of its counterparties showing transactions with them and the appellant should be aware of all of those transactions from its own bank accounts.

108. What the appellant is seeking is unredacted sight of the bank statements of three other taxpayers who have the right to expect that HMRC would accord confidentiality to their record of dealings with parties other than those in the deal chain.

109. The appellant is now seeking to obtain details of transactions by its counterparties with third parties in order to identify the eventual destination of money that passed through the deal chain. I find that that is a very vague request for disclosure and is not supported by any detail.

110. Given the lack of specificity and the focus on the submissions to Judge Citron, I agree with HMRC that the appellant is attempting to relitigate the issues in Judge Citron's Decision by the back door.

111. The general principle is that where a party makes an application for Directions seeking disclosure from another party, the burden is on the party making the application to persuade the Tribunal that there are sufficient reasons for granting it. It is not for the other party to persuade the Tribunal that the application should not be granted.

112. I would have expected argument, relying on Rules 2, 5, 27 and possibly 16 of the Rules, supported by reference to relevant case law and argument on the facts. I do not have any of that.

113. HMRC have argued that the Application for Specific Disclosure is not made out. I agree.

Decision

114. Both Applications are refused for the reasons set out above.

Right to apply for permission to appeal

115. 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.

ANNE SCOTT
TRIBUNAL JUDGE

Release date: 27th NOVEMBER 2024 2024