[2011] UKFTT 608 (TC)

TC01451

Appeal number: LON/2007/1703

VAT – MTIC – preliminary hearing – application for part payment of input tax pending substantive hearing – whether the Tribunal has jurisdiction to make such an award - whether unrepresented appellant would otherwise be denied a fair hearing – no to both – application dismissed

FIRST-TIER TRIBUNAL

TAX

ALEENA ELECTRONICS LIMITED **Appellant**

- and -

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

TRIBUNAL: Mrs B Mosedale (Tribunal Judge)

Sitting in public at 45 Bedford Square, London WC1 on 1 August 2011

Mr Andrew Young, Counsel, instructed by D&S VAT Consultants for the Appellant

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

DECISION

1. The Appellant company has appealed against a decision of HMRC to withhold £1,032,255 of input tax on the grounds that the purchases on which this input tax was incurred were connected to the fraudulent evasion of VAT and that the Appellant knew or ought to have known that.

2. The Appellant made an application dated 18 July 2011 that the Tribunal should allow the appeal or direct that an amount of input tax be credited to the Appellant sufficient to allow it to represented in the appeal it brings against HMRC's decision to refuse to refund the input tax. It suggests a figure of £60,000.

3. HMRC objected to the application.

4. The grounds of the application made by the Appellant are many and to some extent overlapping but in summary I understand the grounds to be as follows:

- The input tax should be immediately repaid as the right to deduction arises immediately the input tax was charged to the Appellant;
- The refusal of the Appellant's input tax claim arises under EU law and must only be exercised in accordance with EU law principles such as proportionality;
- Withholding the input tax is contrary to the Bill of Rights 1689;
- Under the European Convention on Human Rights the Appellant has a right to its property and a right to a fair hearing;
- Under Article 2 of the Tribunal's rules the Tribunal has to ensure that an appeal is dealt with fairly and justly which means that the Appellant should be represented.

5. I will consider this application as follows:

1. Does the Tribunal have any jurisdiction to order HMRC to pay some or all of the disputed input tax to the Appellant before the hearing of the substantive appeal?

2. If it does, should it exercise it?

The question about jurisdiction breaks up into a number of sub-issues:

- Does the Appellant have an immediate right to recover the claimed input tax?
- If not, does the Tribunal have jurisdiction to make an interim award?
- If not, does the Tribunal have any kind of judicial review function to review HMRC's refusal to make an interim award?

Immediate right to input tax deduction

6. Mr Young's primary case is that HMRC has no discretion to refuse to release the funds: the right to input tax deduction arises immediately on incurring the tax and HMRC *must* refund the input tax. His primary case is that the Appellant is not asking for interim relief in asking for a payment of a sum sufficient to enable it to instruct legal representation at the hearing of the appeal: it is asking for payment of money to which it has a current entitlement. Mr Young's case, as I understand it, is that whatever the outcome of the substantive hearing in this case, the Appellant has an immediate right to the input tax *now.*

Does the Appellant have an immediate right under EU law?

7. I note in passing that were Mr Young to be correct, the Appellant would be entitled to a full repayment of the refund now. There would be no need to limit the claim (as Mr Young has in the name of proportionality) to an amount sufficient to enable it to be represented at the appeal. He is not asking for the full £1 million plus now.

8. In support of his view, Mr Young cites *EC Commission v France* [1988] ECR 4797, C-50/87:

> "[16]…in the absence of any provision empowering the Member State to limit the right of deduction granted to taxable persons that right must be exercised immediately in respect of all taxes charged on transactions relating to inputs.
>
> [17] Such limitations on the right of deduction have an impact on the level of the tax burden and must be applied in a similar manner in all member States. Consequently, derogations are permitted only in the cases expressly provided for in the Directive"

9. We agree that it is the law that the right to deduction of input tax arises *immediately* when the tax is paid*:* but the question in this case is whether the Appellant has any right to deduction of input tax at all. If the ultimate ruling of this Tribunal is that the Appellant did not know and should not have known of a connection to fraud, or if the connection to fraud is not proved, then HMRC will be liable to repay the input tax with interest as the Appellant's right to it arose immediately on incurring it in 2006.

10. Mr Young then points to the decision of the CJEU in *Kittel v Etat Belge* C-439/04 where the Court said at paragraph 61:

> "By contrast, where it is ascertained, having regard to objective factors, that the supply is to a taxable person who knew or should have known that, by his purchase, he was participating in a transaction connected with fraudulent evasion of VAT, it is for the national court to refuse that taxable person entitlement to the right to deduct."

Mr Young's interpretation of this is that up to the point that a national court (such as this Tribunal) makes a decision that the Appellant is not entitled to deduct the input tax at issue then the Appellant has a valid claim to it.

11. We consider such an analysis to be wrong. Although the CJEU does in *Kittel* speak in terms of "losing their right to deduct the input VAT" and "it is for the national court to refuse…the right to deduct", nevertheless it is clear from the context and the scheme of the CJEU's decision that a person who knowingly enters into a transaction connected with fraud never acquires a right to deduct the input tax. Paragraphs 45-51 look at the right to deduct VAT which arises at the time it is incurred: the subsequent paragraphs are a qualification to that right.

12. Where the CJEU used the expression "it is for the national court to refuse…" this was in the same sense as earlier they said (paragraph 55) that tax authorities can reclaim input tax fraudulently reclaimed: the national court and the tax authorities should do this because the taxpayer has no right to the input tax and never did have a right to it.

13. In *Kittel* the CJEU was not focussed on *when* the right to deduct was lost: the question was in what circumstances the right would be lost. It would be a most surprising conclusion that the CJEU, when not even asked the question, could be taken as saying that *despite* knowingly entering into a transaction connected with fraud a taxpayer acquired an entitlement to the input tax unless and until a court ruled against it. In the contrary, the CJEU said "Community law cannot be relied on for abusive or fraudulent ends" (paragraph 54).

14. It is also clear that the CJEU considered itself as following its own jurisprudence and in particular the decision in *Optigen* C-354/03. In that case the CJEU ruled:

> "(paragraph 55)….The right to deduct input tax of a taxable person who carries out such transactions cannot be affected by the fact that in the chain of supply of which those transactions form part another prior or subsequent transaction is vitiated by VAT fraud, without that taxable person knowing or having any means of knowing."

15. The clear and obvious implication of this is that the CJEU considered that the right of a person to deduct to input tax would be affected by entering into a transaction connected with fraud if they knew of ought to have known of it. I consider the correct interpretation of the decision of the CJEU is that where a taxpayer enters into a transaction which it knows (or ought to have known) was connected with fraudulent evasion, no right to deduct input tax on that transaction arises at all.

16. In any event I am bound to reach that conclusion as it was the interpretation which the Court of Appeal placed on *Kittel* in *Mobilx Ltd (In Administration)* [2010] EWCA Civ 517*:*

> "(paragraph 43)…A taxable person who knows or should have known that the transaction which he is undertaking is connected with fraudulent evasion of VAT is to be regarded as a participant and, equally, fails to meet the objective criteria which determine the scope of the right to deduct."

17. In conclusion, ordering HMRC to repay the whole or part of the claimed input tax now would be to pre-judge the subject of the appeal which is whether the Appellant

has the right to repayment of that input tax. It only has an immediate right to that repayment *if* it did not know and should not have known of a connection to fraud and/or there is no connection to fraud. If the ultimate outcome of the case is that the Appellant is unsuccessful, then (with the benefit of hindsight) we can determine that the Appellant never had any right to the input tax at all at any time.

Does EU law apply at all?

18. Mr Young considers that neither *Kittel* (described by him as judge-made or common law of the EU) nor English law and in particular the VAT Act gives HMRC the right to withhold tax. I cannot agree with this either. *Kittel* is not "common law of the EU". It is an interpretation by the CJEU of the Sixth VAT Directive (now the Principle VAT Directive). The Court of Appeal in *Mobilx* has ruled that on the right to deduct input tax, EU and domestic law are one and the same (see paragraph 20 below). In using *Kittel* to refuse the Appellant repayment of VAT, HMRC are relying on domestic law.

19. In any event, of course, in so far as HMRC refuse to refund the input tax on the grounds that the Appellant *knew* of the connection to fraud HMRC could rely as much on English common law as VATA 1994. There is no right under common law to rely on one's own fraud. (It is of course yet to be determined whether the Appellant knew of a fraud).

20. Mr Young also suggested that the Bill of Rights 1689 was of assistance to his client as it provides:

> "That levying of money for or to the use for the Crown by pretence of prerogative, without grant of Parliament, for longer time, or in other manner than the same is or shall be granted, is illegal;"

I understand his view to be that as the Bill of Rights made taxation without legislation unlawful, HMRC cannot rely on *Kittel* because it is not enacted in a statute. This is of course an argument to which I cannot accede because the Court of Appeal has already ruled in *Moblix* that the doctrine in *Kittel* is part of the VATA and therefore is part of our legislation:

> "[49] It is the obligation of domestic courts to interpret VATA 1994 in the light of the wording and purpose of the Sixth Directive as understood by the ECJ….as the ECJ itself recognised, that the application of the *Marleasing* principle may result in the imposition of a civil liability where such a liability would not otherwise have been imposed under domestice law …the denial of the right to deduct in this case stems from pnciples which apply thoughout the Community in respect of what it said to be reliance on Community law for fraudulent ends. It can be no objection to that approach to Community law that in purely domestic circumstances a trader might not be regarded as an accessory to fraud. In a sense, the dichotomy between domestic and Community law, in the circumstances of these appeals, is false. In relation to the right to deduct input tax, Community and domestic law are one and the same."

21. The issue is that the Appellant does not agree with the interpretation of a taxing statute: it is not a case of taxation without legislation.

22. In any event, the Bill of Rights, fundamental to our constitution as it is, applies only to taxation. The Appellant is not being taxed: it is being denied a refund.

Conclusion

23. That disposes of Mr Young's first ground: whether the Appellant does have an immediate right to deduction of the claimed input tax is to be determined by this Tribunal at the substantive hearing. Pending this Tribunal's decision following that hearing, the Appellant has no presently enforceable right to be paid all or any part of the sum claimed.

Does the Tribunal have jurisdiction to make an interim award?

24. Although Mr Young did not couch it in these terms, what the Appellant is really seeking in the alternative is some kind of interim relief. It hopes to win its appeal and wants some of the money now. Its case is that it may not be appropriate to order interim relief in many cases, but it should be ordered where otherwise the Appellant may be unable to properly pursue its appeal.

25. Its case is that HMRC has unlawfully withheld the input tax because either there was no connection to fraud or if there was the Appellant did not and should not have known of it. But denied of the input tax the Appellant has no funds (it claims) and therefore may be unable to win the appeal to obtain the money to which it is (it claims) entitled. This, it says, is a denial of justice.

26. Is there any jurisdiction to grant the relief sought? The Tribunal Procedure (First tier Tribunal)(Tax Chamber) Rules 2009 provide as follows:

> **Overriding objection and parties' obligation to co-operate with the Tribunal**
>
> **2(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.

27. Mr Young's case is that the overriding objective is mandatory. We do not quarrel with this. Nevertheless, we cannot agree that the overriding objective means that anything has changed: it was always the objective of the VAT & Duties Tribunal to deal with cases fairly and justly.

28. We also note the limits of Rule 2. The overriding objective applies to exercise of the Tribunal's powers under the rules and the interpretation of the rules or any practice direction made under the rules. The overriding objective does not give the Tribunal power to do anything not within the scope of the rules. The Tribunal is a creature of statute.

29. Rule 5 gives the Tribunal power to regulate its own procedure. It does not give it power to grant interim relief. Far from it, in so far as it has a power to award costs this is under Rule 10 and it is implicit to an award of costs that the costs have been incurred.

30. Mr Young also says the Tribunal has jurisdiction from an application of the rules of *Kittel*: the CJEU gives the national court power to deny input tax. Therefore it must give it the power to allow it. I cannot agree. In *Kittel* the CJEU was not awarding national courts any power they did not already possess (and it has no jurisdiction to do so). It merely said that where there is no right to input tax recover, a national court should say so. There is nothing in *Kittel* about awarding interim relief.

31. The High Court has power to order interim relief (see for example the case of *Teleos plc & others* [2005] EWCA Civ 200). The High Court is not a creature of statute but has inherent jurisdiction: this is not true of the Tribunal.

32. Mr Young also claims that s83(c) VATA 94 gives the Tribunal jurisdiction to award interim relief. This provides:

> "Subject to section 84 an appeal shall lie to a tribunal with respect to any of the following matters –
>
> (a) …
>
> (b) ….
>
> (c) the amount of any input tax which may be credited to a person;
>
> (d) …etc"

Mr Young's case is that the use of the word "matters" means section 84 is wider than considering decisions made by HMRC. He says s83(c) gives the Tribunal power to make an interim award to the Appellant.

33. I cannot agree. Section 83 (c) only gives the Tribunal power to decide the amount of input tax to which an Appellant is entitled. The Tribunal can only decide

liability: even were the Tribunal to decide that the Appellant should be credited with input tax it has no power to make an order that HMRC must pay it. If HMRC were to fail to pay it, the Tribunal has no jurisdiction to force them to do so. Even more fundamentally, the Tribunal can only make a decision under s83(c) with respect to *input tax which may be credited.* If the Appellant is not entitled to be repaid its claim, the money is not input tax; and it is certainly not input tax which can be credited to the Appellant.

34. There is nothing in s 83(c) which gives this Tribunal a power to make an interim award and certainly nothing that gives the Tribunal power to make an award without determining whether the applicant is entitled to it. Mr Young is in effect asking me to pre-judge the issue to be decided at the substantive hearing. I cannot do this.

35. In conclusion, I do not consider that the Rules of this Tribunal nor the VAT Act itself gives this Tribunal any power to make an interim award pending the substantive hearing. Further, although this Tribunal does have jurisdiction to award costs, it can only do so once they have been incurred.

Does the ECHR affect the position?

36. The European Convention on Human Rights does not give this Tribunal any power that it does not possess under UK law: but when interpreting UK law I must read it with the Convention in mind. Section 3 of the Human Rights Act 1998 provides:

> "(1)So far as it is possible to do so, primary legislation and subordinate legislation must be read and given effect in a way which is compatible with the Convention rights."

37. Section 4 of the Act which permits a court to make a declaration of incompatibility does not apply to this Tribunal which is not a court as defined.

Article 1 of the first protocol to the convention

38. The Appellant asserts that its rights under the Convention are interfered with. The Convention provides as follows:

> "[Article 1 of first protocol] Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.
>
> The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties."

39. In *Bulves AD v Bulgaria* (3991/03) [2009] ECHR 143 the European Court of Human Rights ruled that the disputed right to recovery of input tax was a possession within the meaning of the Convention:

> "[57] …the Court considers that, in so far as the applicant company had complied fully and in time with the VAT rules set by the State, had no means of enforcing compliance by its supplier and had no knowledge of the latter's failure to do so, it could justifiably expect to be allowed to benefit from one of the principle rules of the VAT system of taxation being allowed to deduct the input VAT it had paid to its supplier. Moreover, only once a claim for such a deduction had been made an a cross-check of the supplier had been conducted by the tax authorities could it be ascertained whether the latter had fully complied with its own VAT reporting obligations. Thus, the Court considers that the applicant company's right to claim a deduction of the input VAT amounted to at least a "legitimate expectation" of obtaining effective enjoyment of a property right amounting to a "possession" within the meaning of the first sentence of Article 1 of Protocol no 1…"

40. However, as can be seen from above, that conclusion was reached by the court in a situation where the only reason the input tax deduction was refused was a matter (ie whether its supplier had properly accounted for the output tax) beyond the knowledge or control of the Applicant. The Applicant was not alleged to have done anything wrong. It is far from clear that the Court would regard the Appellant in this case as having a *legitimate* expectation that its input tax will be repaid: the Court is likely to consider that to be the case only if HMRC fails to make out its allegation that the appellant knew or ought to have known its transactions were connected to fraud.

41. The inevitable conclusion is that the substantive hearing in this appeal will determine whether the Appellant has a property right (the right to input tax recovery) and until that determination is made it is not apparent it even has a legitimate expectation that it will recover its input tax. So unlike the Applicant in *Bulves* I do not consider that the Appellant can at this point in time claim a possession under Article1 of the Convention.

42. In any event, even were I to be wrong on this, the Convention allows property rights to be interfered with in accordance with the law and to secure the payment of taxes. In *Bulves* the ECHR found the interference with the Applicant's property right (its legitimate expectation to be repaid tax) to be disproportionate to the taxing authority's legitimate need to secure compliance with taxing obligations. It notes specifically that its finding was in the context of a case where there was no fraud of which the applicant had knowledge or means of knowledge.

43. Therefore, even were the Appellant in this case already to have acquired a property right under Article 1 to the first protocol, HMRC's interference with it by refusing to make the repayment because it considered the Appellant knew (or ought to have known) its transactions were connected with fraud is not disproportionate nor in breach of the ECHR. This is clear from the Court's decision in *Bulves.*

44. I have found that UK law does not allow this Tribunal to make an interim award towards payment of the Appellant's prospective costs. I do not need to re-consider that interpretation of UK law in view of s 3 Human Rights Act because I find that position is already consistent with the Convention. There is nothing in the Court's

interpretation of the Convention in *Bulves* which requires this Tribunal to have a power to make an interim award: the Appellant's claim for repayment of input tax is not (yet) a legitimate expectation sufficient to amount to a property interest and even if I am mistaken on this, HMRC, by withholding input tax from a person they allege knew of a connection to fraud, are not acting disproportionately to their legitimate need to secure the payment of taxes (or prevent the re-payment of taxes not properly due to be repaid.)

Article 6

45. Article 6 of the Convention guarantees a right to a fair trial. It provides as follows:

> Article 6
>
> Right to a fair trial
>
> 1. In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law.
>
> Judgment shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interests of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice.

2. Appeals over the imposition of tax penalties have been found to be criminal in nature even where the penalty is minor (*Jussila v Finland* [2006] ECHR 996) but this appeal is a case concerning the Appellant's entitlement to repayment of input tax. No penalty has been imposed. It is therefore a civil case under the Convention and Part 2 of Article 6, which deals with the rights of those accused of criminal offences, is not relevant here and I do not set it out.

46. The Appellant's case is it has a right to a fair hearing and that in being denied its input tax it is being denied representation in its appeal and that inevitably means it is denied a fair hearing.

47. Does the Convention guarantee it a right to a fair hearing? The majority of Judges in the ECHR decided in the case of *Ferrazzini v Italy* [2001] ECHR 464 that tax disputes are not about "civil rights or obligations" under the Convention. The effect is that the Convention (rather surprisingly) does not guarantee the Appellant a right to a fair hearing in a tax case.

48. This does not matter: as a matter of UK common law the Appellant is entitled to a fair hearing. However, I consider the Tribunal will give the Appellant a fair hearing even if unrepresented for the reasons given below in paragraphs 60. So in conclusion I see nothing in its right to a fair trial that would mean I should interpret any legislation as giving me the power to award interim relief.

Is HMRC's behaviour amenable to judicial review by this Tribunal?

49. HMRC, as was recognised by the High Court in *Teleos* has the power to make a discretionary interim award: its refusal to do so is amenable to judicial review. Mr Young points out that HMRC has chosen in at least one case to pay costs towards the expenses of an Appellant in an MTIC case in front of an appeal court.

50. Although Mr Young appeared to accept that the Tribunal has no supervisory jurisdiction which would allow it to review HMRC's refusal to exercise a discretion to release funds to enable the Appellant to pursue this appeal, nevertheless the contrary did appear to form part of his case as he alleged HMRC's conduct was disproportionate and referred us to *Oxfam* [2009] EWHC 3078 and *Reed Employment plc & others* [2010] UKFTT 596 (TC).

51. While I agree that Mr Justice Sales' decision in *Oxfam* means that a Tribunal must consider an appellant's legitimate expectations when assessing its rights and liabilities under the VAT Act, that is a very far cry from the Tribunal having any general power of judicial review of HMRC's actions. The Tribunal is a creature of statute and only has power to do what statute has provided. It is clear Mr Justice Sales did not consider that the Tribunal had any general power of judicial review. The High Court's powers of judicial review arise from its inherent jurisdiction: the Tribunal has no such inherent jurisdiction and therefore no power of judicial review.

52. Mr Young cites the CJEU decision in *Sosnowska* C-25/07 for the proposition that HMRC must act proportionately when taking steps to prevent fraud. And it is not proportionate, says Mr Young, for HMRC to withhold input tax in circumstances where this beggars the Appellant to the extent that they cannot afford representation at the hearing of the appeal to reclaim the money to which they consider themselves entitled.

53. At paragraph 24 of its decision the CJEU said:

> "It is clear from the case-law that national legislation determining conditions for repayment of excess VAT which are more onerous for one category of taxable person because of a presumed risk of evasion, without making any provision for the taxable person to demonstrate the absence of tax evasion or avoidance in order to take advantage of less restrictive conditions, is not a means proportionate to the objective of combating tax evasion and avoidance and has a disproportionate effect on the objectives and principles of the Sixth VAT Directive."

That case concerned a national requirement for taxpayers to lodge a security deposit to avoid an extended period of verification before their input tax was repaid. This

case is quite different. HMRC are seeking to apply a ruling of the CJEU itself (ie *Kittel)*. It is plain that the interpretation of the Sixth VAT Directive given by the CJEU in *Kittel* is not disproportionate in the view of the CJEU or else they would not have given the decision they did. There is nothing in *Sosnowska* that does or could confer on this Tribunal a power to order HMRC to make an interim award.

54. I conclude that this Tribunal has no power to judicially review HMRC's refusal to make an interim award and/or contribute to the Appellant's legal costs of its appeal.

Even if there was jurisdiction to grant interim relief would the Tribunal do this?

55. I note that the Appellant has asserted but not proved its impecuniosity. It is of course the case that this would have to be proved to the Tribunal were the Tribunal to have concluded (contrary to the conclusion I have reached) that I had jurisdiction to grant interim relief.

56. Even if a prospective award of costs could be made and/or interim relief granted, and even if the Appellant had proved it was unable to instruct counsel, a Tribunal would be extremely reluctant to make an interim award. The potential unfairness to the Respondents is manifest: assuming that the Appellant's appeal is unsuccessful, the order would have made the Respondent's pay the unsuccessful Appellant's costs whereas (where there is a costs jurisdiction) they would rather expect to be awarded their own costs.

57. In my view it must be the case that even were a Tribunal to contemplate such an order with a 50/50 chance (on the face of it) of leading to manifest unfairness to the Respondents, it would at the very least expect to be satisfied that (a) it is very likely that the Appellant's appeal would succeed and (b) that a fair trial could not be achieved in any other way.

58. On the first of these issues, Mr Young did not lead any evidence to show that it was very likely the Appellant's appeal would succeed although, if this were the only concern, no doubt the Tribunal could be reconvened to consider this. But it is not.

59. Mr Young's view is that a fair trial can only be achieved where the Appellant is represented.

60. I do not accept that a fair trial can only be achieved where the Appellant is represented. It is the ethos of the Tribunal system and certainly that of the Tax Chamber of the First-tier Tribunal that a taxpayer can bring an appeal to a tax-expert Tribunal without the expense of instructing representatives. The Tribunal hearing a substantive appeal will be expert: it will know the law and will take the legal points at the hearing that an unrepresented appellant may not. Where the Appellant is unrepresented the Tribunal panel will take on a more inquisitorial role and will ask witnesses questions which an unrepresented Appellant may not think to ask. More pre-hearing reviews may be required so that a Judge can explain to the unrepresented appellant exactly what is required and what he must do to prepare for the hearing.

61. I reject Mr Young's assumption that without representation the hearing will not be fair. Therefore there is no good reason (even if this Tribunal could, which it cannot) for it to make an order for the Appellant's prospective costs to be paid.

The Appellant's alternative case

62. The Appellant's alternative case was that if I did not grant an order for at least part repayment of the input tax, then I should rule that HMRC should not be able to rely on evidence of connection to fraud. This is, as Mr Young accepted, tantamount to saying I should allow the appeal. His grounds for this application was that I should allow the appeal because without representation the Appellant could not have a fair hearing.

63. I can see no good grounds whatsoever on which this application is made. I have entirely rejected Mr Young's case that a fair hearing cannot be had without representation. So why should the Appellant recover the input tax without answering the HMRC's case that its transactions were connected to fraud and it knew it? To make such an order would be a denial of justice and I refuse to make it.

64. The Appellant's application is dismissed.

Directions

65. Attached to this decision notice are directions made for the case management of this appeal.

Rights of appeal

66. 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.

TRIBUNAL JUDGE
RELEASE DATE: 16 September 2011