TC02770

Appeal number: LON/2008/00827

PROCEDURE – application to amend statement of case – overriding objective of interests of fairness and justice- balancing exercise – real dispute between the parties- issues of limitation - prejudice

FIRST-TIER TRIBUNAL
TAX CHAMBER

MEGANTIC SERVICES LIMITED **Appellant**

- and -

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

TRIBUNAL: JUDGE ROGER BERNER
JUDGE JOHN WALTERS QC

Sitting in public at 45 Bedford Square, London WC1 on 24 June 2013

Tristan Thornton, Consultant, Litigation Law, for the Appellant

Jonathan Kinnear QC and Nicholas Chapman, instructed by the General Counsel and Solicitor to HM Revenue and Customs, for the Respondents

DECISION

1. These are full reasons for our decision, which we gave orally at the pre-trial review of this appeal on 24 June 2013, to allow the application of HMRC to amend its statement of case.

Introduction

2. This appeal is one of those commonly referred to as a missing trader intra-community (or MTIC) fraud case. We need not give any detailed explanation of what that entails, save to say that it involves an allegation, on the part of HMRC, that certain transactions in goods entered into by the Appellant, Megantic Services Limited ("Megantic") were connected to the fraudulent evasion of VAT, and that Megantic knew or should have known of that connection. In those circumstances, according to the case law of the CJEU, most notably *Kittel v Belgium* (Case C-439/04) [2006] ECR 1-6161, the trader will not have satisfied the objective criteria for deduction of input tax incurred on his purchases, and that deduction can be denied.

3. That was the basis of HMRC's decision to deny Megantic repayment of input tax, which was issued to Megantic on 21 May 2007. Megantic lodged an appeal with the then VAT and Duties Tribunal on 19 June 2007. That was followed by a statement of case (amended on 1 December 2008) which set out HMRC's case founded on the *Kittel* principle. The appeal has therefore been on foot for some considerable time; the substantive hearing has been listed to commence in September of this year.

4. There are a number of reasons why this appeal has been in progress for such a long time. It is in large part due to its sheer size and complexity. The substantive hearing is listed for 17 weeks, and there is an enormous quantity of evidence to be considered by the Tribunal; extensive use is being made of electronic document management systems.

The application

5. It is in that context that the present application by HMRC falls to be considered.

6. The application was made on 18 December 2012. It attached the proposed supplement to HMRC's statement of case. The proposed amendment is to introduce a new ground for denying deduction, and consequently repayment, of certain amounts of the input tax in dispute in these proceedings. Put shortly, what is said is that in respect of a number of the transactions which are the subject of this appeal (we understand some 70 out of 400 such transactions) there is evidence that Megantic either paid incomplete consideration for its purchase of the relevant goods or made no payment at all. What this means, according to HMRC, is that under domestic law (section 26A of the Value Added Tax Act 1994 ("VATA")), even if Megantic succeeds in its appeal on the *Kittel* principle, it will nevertheless, to the extent of the input tax on those transactions, be unable to recover that input tax.

7. The reason, as explained by Mr Kinnear, that this issue has now arisen is that, having been permitted by the Tribunal in May 2012 to adduce banking evidence accessed from the French server containing information on accounts (including accounts of Megantic) held in the First Curacao International Bank ("FCIB"), HMRC had been able, they say, to identify with confidence not only deals to which various payments and receipts refer, but also the deals in respect of which there is no evidence of payments and receipts having been made, and indeed evidence that no payments were made.

8. On 3 July 2012, HMRC wrote to the then representatives of Megantic, identifying those deals in respect of which there was no evidence of payment having been made in full or at all. Megantic has not responded to an invitation to provide to HMRC evidence demonstrating that payments were in fact made (and/or received) for the deals in question. Since that time, HMRC say they have undertaken substantial further work to reconcile Megantic's banking transactions.

9. The proposed amendment to the statement of case accordingly introduces a claim on the part of HMRC that a part of the input tax should in any event be denied as a deduction. HMRC's principal case remains that based on the *Kittel* principle; as HMRC correctly note, it is only if Megantic succeeds on *Kittel* that s 26A can be in point, as it is predicated on the trader being entitled to credit for input tax, which would not be the case if Megantic's appeal on *Kittel* were to fail.

Discussion

10. We are asked, as a matter of case management, to permit the amendment, or supplement, to HMRC's statement of case in the way we have described. The starting point for the exercise of a judicial discretion in this regard is the overriding objective, set out in Rule 2 of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009 ("the Tribunal Rules"), to deal with cases fairly and justly. We take this to mean that we must conduct a balancing exercise, taking account of all relevant circumstances, weighing the interests of justice and questions of prejudice to either or both of the parties.

11. We have been guided by well-established authority outside the sphere of the Tribunal, but which refers to the same overriding objective. That authority indicates, firstly that any amendment must be supported by evidence, which in this case is satisfied by the analysis obtained by HMRC from its examination of the FCIB Paris server materials. Secondly, in general terms, but subject always to questions of prejudice, a relevant factor will be whether the amendments will achieve the effect that the real dispute between the parties can be adjudicated upon (see, for example, *Cobbold v Greenwich LBC*, 9 August 1990, unrep CA; *Worldwide Corporation Ltd v GPT Ltd* [1998] EWCA Civ 1894; and *Swain-Mason v Mills & Reev*e [2011] EWCA Civ 14).

12. That leads to the question of the real nature of the dispute in this case. On the one hand, it might be possible to take a narrow view, confining it effectively to the allegations of knowledge or means of knowledge of a connection to fraud. That, in

essence, was the submission of Mr Thornton when he argued that the proposed amendment would introduce a fundamentally different argument. He submitted that this would effectively represent a second, and essentially separate, decision to deny input tax. This was a decision, if now sought to be made separately, would, argued Mr Thornton, be outside normal time limits.

13. The alternative view is that the decision is the denial of recovery of input tax and that the supplemental ground is merely an additional argument addressing the same question. We consider that this is the correct analysis. The case is one of denial of input tax for the transactions in question. If it is found that Megantic is not prevented from satisfying the objective criteria for the deduction of input tax according to *Kittel*, it would not in our judgment be in the interests of justice for such a deduction to be allowed in circumstances where it ought to be precluded by s 26A VATA. The issue of limitation does not, in our view, affect that conclusion. The s 26A ground is concerned with the same input tax (to the extent of non-payment) as was denied repayment in HMRC's original decision made within the statutory time limits; no new decision on the part of HMRC is required in this respect, and the s 26A argument arises out of facts that are already in issue in this appeal.

14. This conclusion is a factor that then has to be weighed in the balance with any prejudice that could arise to Megantic from being faced, at this stage in the proceedings, with the amended case.

15. Mr Thornton argued that there would be such prejudice. Megantic would be faced with evidence derived from a server to which they themselves had had no access. They had no ability to confirm the accuracy of the data on which HMRC based this new case. Megantic may wish to introduce new evidence of its own, including the evidence of a forensic accountant. Although HMRC had served a witness statement on the analysis undertaken in respect of the French FCIB server, that statement had no doubt been the result of work over an extended period, and Megantic would require a similar period in which to marshall its own evidence. There was, submitted Mr Thornton, insufficient time for Megantic to prepare a detailed response. This was a substantial case with a large number of witnesses; to allow this application would overburden the case, and Megantic.

16. We do not accept these submissions. The issue proposed to be raised by HMRC concerns the failure of Megantic to make payment, or full payment, in respect of its own transactions. We do not accept that this case must be met by an analysis of the evidence on which HMRC have reached their own conclusions. The information as to such payments will be in the hands of Megantic itself, which will have had both control over its payments and the records to support the payments that were made. There was no suggestion on behalf of Megantic that the relevant material was not available to it, apart from a rather belated argument by Mr Thornton that HMRC had uplifted records from Megantic. We have no reason to doubt that any such records would have been restored to Megantic, and do not therefore accept that assertion.

17. Furthermore, although we are considering this application a matter of only two months before the scheduled commencement of the hearing, we take into account the

fact that HMRC notified Megantic of the issue, including with specific reference to s 26A, as long ago as 3 July 2012. HMRC's letter of that date was accompanied by a 14-page schedule entitled "Payment Irregularity Schedule", which identified by reference to each transaction amounts claimed by HMRC to have been invoiced to, but which were unpaid by, Megantic. At no stage has Megantic either responded to that schedule with information as to payments made, nor suggested that it would be unable, from its own accounting records, to deal with the issue. In our judgment, Megantic has been given sufficient warning so as not to put it in this respect on an unequal footing or add an excessive burden to Megantic's task of preparing for the hearing in this appeal.

18. For these reasons, and having weighed all the considerations, we consider that the interests of fairness and justice would properly be met by allowing HMRC's application, and we so direct.

Application for permission to appeal and time for applying

19. 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 Rules.

20. Ordinarily, an application must be received by this Tribunal not later than 56 days after this decision is sent to that party. However, if an appeal on this matter is contemplated, then in view of the proximity of the substantive hearing we consider that application ought in the interests of justice to be made sooner. Accordingly, in exercise of our powers under Rule 5(3)(a) of the Tribunal Rules, we reduce the time for applying for permission to appeal to 21 days from the date of release of this decision.

21. 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.

ROGER BERNER
JOHN WALTERS QC
TRIBUNAL JUDGES

RELEASE DATE: 25 June 2013