TC04026

Appeal number: TC/2013/03874

FIRST-TIER TRIBUNAL
TAX CHAMBER

EBUYER LIMITED **Appellant**

- and -

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

TRIBUNAL: JUDGE JOHN WALTERS QC

Sitting in public at the Competition Appeal Tribunal, London on 15 and 16 September 2014

Having heard John Wardell QC and David Scorey for the Appellant and James Puzey and Howard Watkinson for the Respondents

IT IS DIRECTED that

1. The Appellant has liberty to amend its Notices of Appeal to contend that the assessments issued were *prima facie* out of time in respect of the identified periods, pursuant to section 73(6) VAT Act 1994, namely:

(a) Period 03/11 which was assessed on 30 September 2013 and is the subject of the Notice of Appeal in TC/2013/07080; and

(b) Period 12/10 which was assessed on 17 February 201 and is the subject of the Notice of Appeal in TC/2014/01524.

2. The Respondent's application dated 21 March 2014 is ALLOWED for the Reasons given below.

3. The Appellant's application dated 2 June 2014 is DISMISSED for the Reasons given below.

4. The exhibits to the parties' witness statements will stand as the documents which they respectively intend to rely upon or produce in these proceedings.

5. The parties have liberty to apply for further directions

REASONS

1. At this 2-day hearing I heard argument as to whether or not I should allow two contested applications.

2. The first was an application by the Respondents ("HMRC") (dated 21 March 2014) ("HMRC's Application") that rule 27(2) of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009 ("the Rules") should be dispensed with in this appeal as regards the obligations of both the Appellant ("Ebuyer") and HMRC to serve a list of documents, and instead HMRC applied for a direction that the exhibits to the parties' witness statements should stand as the documents which they respectively intend to rely upon or produce in these proceedings.

3. The second was an application by Ebuyer (dated 2 June 2014) ("Ebuyer's Application") in which it applied for a direction that HMRC's Consolidated Statement of Case dated 21 February 2014 ("the SOC") should be struck out, and alternatively for a direction that by an unspecified date HMRC should provide Ebuyer with further and better particulars of their pleaded case as set out in the SOC, by responding to Ebuyer's Request for Further Information attached as an Appendix to their application.

4. Ebuyer also applied (in Ebuyer's Application) for a direction that (again by an unspecified date) both parties should provide disclosure by list (with inspection seven days thereafter) of all documents relevant to the issued in the appeal,

namely, documents on which a party relies; and documents which (i) adversely affect that party's case, (ii) adversely affect the other party's case, or (iii) support the other party's case.

5. These were the matters which were debated at the hearing.

The submissions

6. The gravamen of Ebuyer's complaint was that the SOC did not provide the necessary clarity as to HMRC's case, to enable Ebuyer to prepare its defence (the burden of proof in this appeal – an MTIC appeal – being on HMRC).

7. In particular, Mr Wardell QC complained that HMRC's case as outlined in the SOC was defective, in that there was an insinuation on HMRC's part that Ebuyer itself was a knowing party to a deliberate scheme to defraud HMRC and the SOC did not satisfy the basic requirements of civil fraud pleadings – no proper plea of fraud was made out making the pleading (the SOC) defective. He urged me to direct that the SOC should be struck out – HMRC should be made to produce a new and better Statement of Case – alternatively I should direct that HMRC provide the further and better particulars of the SOC that Ebuyer had requested (a request which ran to 31 pages and, I was told, contained 175 specific requests).

8. HMRC's case was (apart from a significant time limit point taken by Ebuyer) the familiar one that, in relation to each of the 300 chains of supplies in issue in which Ebuyer's purchases featured, the Tribunal is required to determine (i) if there was a tax loss; (ii) if so, whether the loss resulted from a fraudulent evasion; (iii) if so, was Ebuyer's purchase transaction connected with that evasion; and (iv) if so, whether Ebuyer knew, or should have known, that its purchase transaction as connected with a fraudulent evasion of VAT. Mr Wardell agreed that these issues were correctly formulated for the purposes of the litigation of this appeal, which was a challenge to a denial of input tax credit, or the benefit of the deduction of input tax, pursuant to *Axel Kittel v Belgium; Belgium v Recolta Recycling* (C-430/04 and C-440/04) [2008] STC 1537.

9. According to the SOC (paragraph 38), HMRC contend that Ebuyer's transactions:

> 'formed part of an overall scheme to defraud the revenue, that the scheme involved an orchestrated and contrived series of transactions, and that there were features of those transactions which demonstrate that [Ebuyer] knew or ought to have known that this was the case.'

10. And in another part of the SOC (paragraph 79), which Mr Wardell called 'the heart of the document', it is stated that HMRC contend as follows:

> 'The circumstances of [Ebuyer's] trading and those it was trading with could or should have left no doubt that its transactions were connected to fraud. [Ebuyer] was well aware of the risks presented by trading in the wholesale market for these goods with companies that were small, recently established and unknown within the industry and yet it continued to do so even when informed of tax losses in its transactions chains. The inevitable conclusion from this is that it must have known or should have known of its connection to deals and traders that were fraudulent. The information known to [Ebuyer] about its suppliers and customers and how it reacted to that information makes good this point.'

11. Mr Wardell contended that HMRC's pleading of "actual knowledge" was a plea that Ebuyer was a knowing party to a deliberate scheme to defraud HMRC, and, that being so, participation in fraud was being alleged against Ebuyer and it was clear from authority that HMRC's pleading (the SOC) must explain the nature

of the fraud alleged (whether it was carousel fraud or acquisition fraud) and, among other particulars, all facts and matters relied on by HMRC in support of the contention that Ebuyer knew of the fraudulent nature of the alleged scheme. He referred me to extensive authority including *Megtian Ltd (in administration) v R&C Commissioners* [2010] STC 840, *Three Rivers District Council and Others v Governor and Company of the Bank of England (No. 3)* [2003] 2 AC 1, *Towler v Wills* [2010] EWHC 1209 (Comm), and *R&C Commissioners v Sunico A/S and others* [2012] EWHC 4156 (Ch).

12. He drew particular attention to Annexure E to the SOC which suggested, by the charts included there, that Ebuyer was at the centre of the fraud, orchestrating everything and was not engaged in *bona fide* wholesale trade at all. He commented that if it was not HMRC's case that Ebuyer was complicit in fraud, then everything in the SOC that suggested that it was so complicit should not be there, because it was abusive.

13. Mr Wardell complained in relation to the passages in the SOC containing, he submitted, much prejudicial material about Ebuyer's suppliers (paragraphs 55 and following) and customers (paragraphs 63 and following) that it was nowhere alleged that Ebuyer knew or alternatively should have known of this information. The pleading was embarrassing in that it was one which could not be met by Ebuyer because Ebuyer could not know precisely what was being alleged against it. The pleading was too broad and unspecific.

14. In relation to HMRC's pleading that Ebuyer "ought to have known" of the connection to fraud, Mr Wardell contended that the SOC was unacceptably deficient in that, among other things, it did not identify what steps could (and on HMRC's case, should) have been taken by Ebuyer which would have alerted it to the fact of the alleged fraud. HMRC's pleading begged the question as to what Ebuyer would have found out with better due diligence than that actually conducted by it. Ebuyer was entitled to know from the SOC what further information it could have found out which would have led it to the conclusion that the only explanation for its transactions was that they were connected with fraud. A rare example of a proper pleading in this respect was paragraph 102 of the SOC, which was as follows:

> 'Trader Online [an EU customer of Ebuyer]
>
> In the case of Trader Online, which made two purchases from [Ebuyer] in period 3/11 and which was based in the Netherlands, it is not apparent what due diligence checks were undertaken. The principal of that business was a man called Neil Walker. He had been convicted previously with James Brooman of VAT fraud in the UK and was sentenced to five years imprisonment. A simple Google check would have revealed this fact.'

If HMRC could plead Ebuyer's deficiency in its due diligence in relation to Trader Online properly, it should be required to do so throughout the SOC.

15. Mr Wardell submitted that it was unacceptable for HMRC to respond to these concerns by inviting Ebuyer to make itself aware of the exact basis of their case from the Witness Statements which HMRC would in due course serve – this was required to be clear from HMRC's pleading, that is, from the SOC.

16. If I was not minded to strike out the SOC, Mr Wardell advanced, as an alternative case, that I should direct HMRC to provide the extensive further information requested. These requests were chiefly aimed to "flesh out" the SOC

to achieve the clarity and particularity which Mr Wardell suggested it lacked in its current form.

17. Finally, Mr Wardell opposed HMRC's application to dispense with lists of documents on the basis that it was not sufficient that HMRC should disclose such documents as they rely on by way of exhibits to their evidence. He contended that there should be standard disclosure, going beyond what the Rules expressly provide for, to include disclosure by list of documents in HMRC's possession or power which were unhelpful to their case.

18. He submitted that this approach had been advocated by Judge Bishopp (then sitting as a Chairman of VAT and Duties Tribunals) in *Calltell Telecom Limited and Opto Telelinks (Europe) Limited v R&C Commissioners*. In the Tribunal's decision in that appeal, it had said that it was not sufficient in a case of that kind (an MTIC appeal) for HMRC to limit disclosure to the bare minimum required by the VAT Tribunals Rules 1986, namely to those documents which they wished to produce at the hearing, but they should at the same time serve a list of those other documents in their possession which related to the transactions in question but on which they did not intend to rely and should allow an appellant or his advisers access to those documents.

19. He urged me to adopt this course and in support of his submissions on this point made reference to *The Secretary of State for Foreign and Commonwealth Affairs v Quark Fishing Limited* [2002] EWCA Civ 1409 in which Laws LJ emphasised the "very high duty on public authority respondents" to assist the court with full and accurate explanations of all the facts relevant to the issue the court had to decide.

20. To the same effect was *R (on the application of Al-Sweady and others) v Secretary of State for Defence* [2009] EWHC 2387 (Admin) in which Scott Baker LJ referred to the need for disclosure which would enable effective and proper cross-examination to take place.

21. His general submission on this point was that Ebuyer needed to see the documents whose disclosure he applied for in order to ensure fairness and a level playing field between the parties in the appeal. Ebuyer had to be put into a position where it could make its own judgment as to whether or not any tax loss was due to fraud, whether any prior transactions in the chains in which its transactions featured were contrived or, on the other hand, were *bona fide* commercial deals, and as to whether HMRC were painting a fair picture in their pleading and in their evidence about the *bona fides* of Ebuyer's suppliers and customers.

22. He submitted that disclosure by list was a basic safeguard against unfair procedure and that to dispense with it would be outrageous and extraordinary.

23. He submitted that rule 27 of the Rules, which provides for general disclosure by list of documents of which the party providing the list has possession, the right to possession, or the right to take copies, and which the party providing the list intends to rely upon or produce in the proceedings, was out of step with practice in the High Court and was unfair. He urged me to order HMRC to give standard disclosure and follow the course recommended in the *Calltell* decision.

24. Mr Puzey, for HMRC, submitted that there was no legal basis under the Rules for an application to strike out the SOC. In particular there was no express power under the Rules to do so and the Tribunal's case management powers ought not to be interpreted to confer an implied power. Further, he submitted that there was no basis for the Tribunal to require an amendment to the SOC because he maintained that it properly reflected the legal requirements for a statement of case in an appeal against a denial of deduction of input tax under the *Kittel* principle. He submitted that Ebuyer's request for further and better particulars was disproportionate, unreasonable and premature.

25. He submitted that the right course for Ebuyer was to wait until HMRC's witness statements with exhibits were served and then to make (if so advised) a proportionate request for further information or specific disclosure under rule 5(3)(d) of the Rules.

26. Mr Puzey made it clear that it was not part of HMRC's case that Ebuyer was involved as a co-conspirator in fraud. HMRC's primary case was that Ebuyer's trading methods and procedures, described at some length in the SOC, were such that it must have known that its trading was connected to fraud. Alternatively, HMRC contend that all the evidence will show that Ebuyer should have known that such was the case.

27. Mr Puzey acknowledged that there was only a fine line between a case that Ebuyer knew of the connection of its trading with fraudulent evasion of VAT and a case that Ebuyer was itself a fraudulent conspirator in fraudulent evasion of VAT – but nevertheless he submitted that the line between the two, although fine, was there, and HMRC made no allegation of fraud against Ebuyer. As to the allegation that Ebuyer should have known of the connection with fraud, Mr Puzey did not accept that HMRC was bound to identify steps which Ebuyer had not taken and which, if Ebuyer had taken them, would have alerted it to the connection with fraud. It was enough for HMRC to provide evidence to support their contention that Ebuyer should have known of the connection.

28. Mr Puzey submitted that the SOC – of which he was a co-author – made plain the type of fraud with which Ebuyer's transactions were connected. Dealing with one of Mr Wardell's specific complaints, he said that the references in the SOC to the circumstances of Ebuyer's suppliers and customers were relevant to the issue of whether the deal chains in which Ebuyer participated were contrived, and that that issue was relevant to the question of whether Ebuyer knew or should have known of the connection between its transactions and fraudulent evasion of VAT.

29. He submitted that the cases relied on by Mr Wardell as to the correct way to plead an allegation of fraud were cases where, not surprisingly, fraud or participation in fraud had been alleged. But that was not the position in this case.

30. Mr Puzey submitted that many of Ebuyer's requests for further information were unnecessary or otherwise inappropriate and the rest of them were premature. Disclosure of HMRC's evidence would be made in a reasonably short time and the time for Ebuyer to make a more focussed request for further disclosure would be when it had had the opportunity to read and digest HMRC's evidence.

31. He resisted Ebuyer's request for "standard disclosure" or any disclosure beyond that required in the first instance by rule 27 of the Rules on the basis that

the Rules did not require "standard disclosure" to be given in every case but were quite specific that the normal disclosure required was disclosure of evidence on which a party intended to rely at the hearing of the appeal. He noted that the Rules had been drafted since the VAT and Duties Tribunal had decided the *Calltell* appeal. He re-iterated that there was nothing to stop Ebuyer applying later (having considered HMRC's witness evidence) for specific disclosure under rule 5 of the Rules.

Discussion and Decision

32. I accept Mr Puzey's submission that I have no power to strike out the SOC. Rule 8 of the Rules ("Striking out a party's case") distinguishes between an appellant's case and a respondent's case. The Tribunal's power is to bar a respondent from taking further part in the proceedings (rule 8(7)(a)) and Mr Wardell expressly did not ask the Tribunal to make a direction in these terms. The requirement for HMRC to send and deliver a statement of case is contained in rule 25 of the Rules. It is stated there (rule 25(2)(b)) that a statement of case must set out the respondent's position in relation to the case.

33. If I was of the view that the SOC did not set out HMRC's position in relation to the case, I would direct HMRC, in the exercise of the Tribunal's case management powers in rule 5 of the Rules, to amend it so that it did.

34. However, in my view the SOC adequately sets out HMRC's position in relation to the present appeal, which is that in respect of all the transactions in issue they are connected with fraudulent evasions of VAT by identified defaulting traders (see: paragraph 46 of the SOC) which have caused tax losses (paragraph 45 of and Annexure E to the SOC), and that Ebuyer knew or should have known of that connection (those connections).

35. I accept that there is no allegation made by HMRC of involvement as a co-conspirator in any fraud, but instead there is an allegation of knowledge of the connection with fraud. The references in the SOC to an overall scheme to defraud the revenue involving an orchestrated and contrived series of transactions are, I accept, details as to relevant circumstances surrounding Ebuyer's transactions, which HMRC may relevantly allege in order to establish, if they can, the context in which Ebuyer's transactions took place. Establishing this context will be relevant as it will assist the tribunal in determining what Ebuyer knew or ought to have known (see: the passage from the judgment of Christopher Clarke J in *Red 12 Trading Limited v R&C Commissioners* [2009] EWHC 2563 (Ch) at [109] to [111] cited with approval by Moses LJ in *Mobilx Ltd (in administration) v R&C Commissioners* [2010] STC 1436 at [83]).

36. The same comment can be made about the detail in the SOC relating to Ebuyer's suppliers and customers. HMRC can legitimately say that that detail is relevant in establishing the context in which Ebuyer's transactions took place.

37. This should not embarrass Ebuyer, which is not obliged to put in a defence to the SOC – a material distinction between the Tribunal's procedure and that in the High Court in civil litigation – and I see no vice in requiring Ebuyer to wait to read HMRC's witness evidence to ascertain more particularity about what is alleged as to what Ebuyer knew or ought to have known. I would expect the clarity which Mr Wardell demanded to be achieved at that stage, and, if it is not, then I agree with Mr Puzey that the proper and convenient (and proportionate) course would be for Ebuyer to apply to the Tribunal for a (properly focussed)

direction requiring HMRC to provide documents, information or submissions pursuant to rule 5(2)(d) of the Rules.

38. On the question of the basis of the alternative allegation that Ebuyer should have known of the alleged connection with fraud, I accept that Ebuyer may legitimately ask what further information it could have found out which would have led to the conclusion that the only explanation for its transactions was that they were connected with fraud. But the answer to that question cannot be determinative of the 'should have known' issue, the answer to which will be derived from the Tribunal's consideration of all the relevant evidence as a whole, including, of course, Ebuyer's witnesses' evidence of their trading practice and state of knowledge.

39. From what is said above, I have concluded that Ebuyer's applications to strike out the SOC, and its alternative application that HMRC should provide further and better particulars of their pleaded case as set out in the SOC are misconceived and must be rejected.

40. As to Ebuyer's application at this stage for "standard disclosure" going beyond what is provided for by rule 27 of the Rules, I reject that also. Litigation in this tribunal is intended to conform to a different model from litigation in the High Court and the Rules establish the framework within which litigation in this tribunal is to be carried on. Rule 27 provides for the normal disclosure in a standard or complex case and I consider it would not be appropriate for me, at this stage in this litigation, to require wider disclosure than that required by rule 27. It is, in my view, no answer to complain in this forum about the inadequacy of the terms in which rule 27 is framed.

41. I also consider that HMRC's application to dispense with the requirement on each party to send or deliver a list of documents ought to be allowed in the interests of convenience and saving costs. I will direct, as HMRC requested, that the exhibits to the parties' witness statements shall stand as the documents which they respectively intend to rely upon or produce in these proceedings. In my view, no substantial injustice will arise from this direction and it is in harmony with the view I take that Ebuyer must ascertain the full particulars of the case it has to meet from a close examination of HMRC's witness evidence.

Costs and other matters

42. Both sides made oral applications for the costs of the hearing on 15 and 16 September 2014. As I have allowed HMRC's application and dismissed Ebuyer's application, I indicate at this point that I am minded to make an order in respect of costs in HMRC's favour if a written application with schedule as required by rule 10(3) of the Rules is sent or delivered in time.

43. Once Ebuyer has had an opportunity to examine HMRC's evidence and consider its own position in the light of it, I would expect the Tribunal to give serious consideration to making the directions referred to at [47] to [49] of the Upper Tribunal's decision in *R&C Commissioners v Fairford Group plc (in liquidation) and Another* in an attempt to narrow the issues and generally to achieve a more focussed approach to the appeal.

44. Finally, at Mr Puzey's request I mention that it seems to me that if it is necessary for HMRC to prove connection with a fraudulent tax loss, it will be appropriate and proportionate, in an appeal with 300 chains in issue, for the Tribunal to direct that a sampling exercise is undertaken. This would be in order

to achieve a manageable number of fairly representative chains which, if the relevant connection was proved in them, would allow the Tribunal to conclude that the relevant connection had been shown in the other chains of which the sample chains concerned were representative.

45. I also mention that in an appeal of this size, the Tribunal's experience has shown that there are considerable advantages in terms of the ease of conduct of the appeal hearing itself (and the post-hearing consideration by the Tribunal) if most of the documentation (especially the exhibits to the witness statements) is handled and presented electronically at the hearing rather than in paper form.

Right of appeal

46. This document contains full reasons for my decisions in relation to the applications referred to. Any party dissatisfied with a decision relevant to it has a right to apply for permission to appeal against it pursuant to rule 9 of the Rules. An application must be received by this Tribunal not later than 56 days after this document 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 document.

JOHN WALTERS QC
TRIBUNAL JUDGE

RELEASE DATE: 24 September 2014