



TC06256

Appeal number: TC/2016/00424

VAT - MTIC - case management hearing - application for specific disclosure – application dismissed

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

SVS SECURITIES PLC

Appellant

- and -

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

Respondents

TRIBUNAL: JUDGE ALEKSANDER

Sitting in public at Taylor House, London on 30 November 2017

Ben Walker-Nolan, counsel, instructed by The Khan Partnership LLP for the Appellant

Simon Pritchard, counsel, instructed by the General Counsel and Solicitor to HM Revenue and Customs, for the Respondents

DECISION

Background

1. The appeal is against HMRC's decisions given in December 2015 to deny the Appellants' claim to input tax on "*Kittel*" grounds, that the Appellants knew, or should have known, that their transactions were connected with fraud. HMRC issued an assessment for £10,625,574. The Appellants appealed against HMRC's decision on 21 January 2016. The parties agreed directions in January 2017, which were approved by the Tribunal on 6 March 2017.

2. HMRC served their evidence in accordance with the directions in February 2017. The Appellants requested disclosure of various officers' notebooks, which were provided to the Appellants on 27 April 2017, and at the same time the parties agreed that the Appellants' time for serving its evidence should be extended to 31 May 2017.

3. On 26 May 2017 the Appellants wrote to HMRC requesting disclosure of submissions and accompanying letters from the responsible HMRC assurance officers to HMRC's policy unit recommending denial of input tax on *Kittel* grounds, and disclosure of the policy unit's response. HMRC refused to give disclosure of those documents. The Appellant now applies to the Tribunal for a direction that HMRC give disclosure of those documents (the "means of knowledge" or MOK submissions) and for a corresponding extension of time for the service of its evidence.

4. The Appellants' grounds for this application are that the HMRC assurance officers, who were responsible for the original decision letter, will be called to give oral evidence at the substantive hearing. The Appellant will want to cross-examine these officers, and will want to point out any inconsistencies in their evidence and seek to undermine it. The Appellants submit that this is part of the function of cross-examination and is "fair game" for the Appellant to explore. Disclosure of the MOK submissions is necessary so that the Appellants can compare what the relevant officers were saying at that time to the policy unit, and what they now say in their evidence. The Appellants can then determine whether there are any inconsistencies. The Appellants note that there is no duty of general disclosure in the Tribunal (in contrast to litigation in the High Court governed by the civil procedure rules or in criminal trials) and that under the Tribunal's rules there is no duty on parties to disclose all relevant documents. Under the Tribunal's rules, disclosure is limited to those documents on which a party intends to rely. Given these circumstances, the Appellants further submit that the Tribunal, in exercising its discretion as to whether to order disclosure, should err on the side of caution, and be generous in ordering disclosure.

5. HMRC oppose the application on the grounds that the MOK submissions are irrelevant to the issues before the Tribunal. The Tribunal is not exercising supervisory jurisdiction in this case, but has full appellate jurisdiction. It will be deciding the appeal *de novo* and HMRC's decision making process is therefore irrelevant. It is for the Tribunal to decide for itself whether the Appellants had

knowledge that the transactions were connected with fraud (or should have had such knowledge). Indeed, HMRC submit that if the Tribunal relied on the opinion of an HMRC officer on this question, it would have made an error of law.

5 6. HMRC note that the Appellants have not, in their submissions, referred to
particular paragraphs in HMRC's witness statements or exhibits, nor argued that
disclosure of the MOK submissions is required in order to challenge specific parts of
HMRC's evidence. Indeed, if the Appellants' grounds truly are that they require the
MOK submissions for the purposes of preparing for cross-examination of HMRC's
10 witnesses, this should not have held up the preparation and filing of their own witness
statements.

15 7. I was referred by the parties to two decision of Judge Mosedale relating to
disclosure of MOK submissions in MTIC appeals (and I note that in both cases, the
Appellants were represented by the Khan Partnership, the Appellants' solicitors in this
case). In the first case (*Masstech Corporation (in administration) v HMRC* [2011]
UKFTT 649 (TC)) she ordered disclosure of the MOK submissions. In the second
case (*Electrical Environmental Services Ltd v HMRC* [2014] UKFTT 0129 (TC)) she
did not. Both parties made submissions on these decisions, and sought to draw out
some general principles from Judge Mosedale's reasons. The only conclusions that I
20 can draw from her decisions is that a decision to order disclosure will depend on the
particular facts and circumstances of the individual appeal before the Tribunal, and
that there is no general principle that MOK submissions should (or should not) be
disclosed in every MTIC appeal where an input tax credit is denied on *Kittel* grounds,

Conclusions

25 8. Under the Tribunal's rules, the Tribunal is required to have regard to the
overriding objective in Rule 2 when exercising its power to make directions. The
objective requires the Tribunal (amongst other things) to deal with cases 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, and to avoid delay, as far as
compatible with proper consideration of the issues.

30 9. Ordering disclosure of irrelevant documents is incompatible with the overriding
objective. No grounds were advanced by the Appellants as to why the MOK
submissions were relevant evidence - beyond being "fair game" for the cross-
examination process. It should go without saying that cross-examination is not a
"game". The application for disclosure in this case is in my view no more than a
35 fishing expedition, without any substantive merit. I have therefore decided not to
make a direction ordering disclosure of the MOK submissions.

10. As regards the Appellants' application for an extension of time, HMRC took a
pragmatic approach, and did not object to the Appellants' application that time for the
service of their evidence be extended by 14 days from the date of this hearing.

Directions

11. The Appellants' application for a direction that HMRC give disclosure of the MOK submissions is dismissed.

5 12. I direct that the time for service of the Appellants' witness evidence and accompanying documents (under paragraph 2 of the Directions issued approved by the Tribunal on 6 March 2017) be extended until 13 December 2017.

10 13. 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.

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**NICHOLAS ALEKSANDER
TRIBUNAL JUDGE**

RELEASE DATE: 4 December 2017

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