[2018] UKFTT 198 (TC)

TC06412

Appeal number: TC/2015/6501

PROCEDURE – application for summary judgment – misconceived – application for disclosure –largely a fishing expedition and largely refused

FIRST-TIER TRIBUNAL
TAX CHAMBER

RONALD HULL JUNIOR LIMITED **Appellant**

- and -

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

TRIBUNAL: JUDGE Barbara Mosedale

Sitting in public at Taylor House, Rosebery Ave, London on 1 February 2018 and with further submissions on 15 and 28 February and 1 March 2018

Mr Firth, Counsel, for the Appellant

Mr N Chapman, Counsel, instructed by the General Counsel and Solicitor to HM Revenue and Customs, for the Respondents

DECISION

1. The appellant appealed against a decision of HMRC dated 17 July 2015 assessing it to tax of £597,172 on the basis that it was not entitled to reclaim input tax in that sum which it had offset in its VAT returns for periods 7/13, 10/13 and 1/14. In making the assessment, HMRC relied on the doctrine in the joined CJEU cases of *Kittel* and *Recolta Recycling* C-439/04 and C-440/04 denying that the appellant was entitled to the input tax credit on the basis (HMRC alleged) it knew or ought to have known its transactions were connected to fraud.

2. Since then the parties have been preparing the appeal for hearing. Following the service of the statement of case in January 2016, the appellant applied for further particulars of it, which application I largely refused [2016] UKFTT 525 (TC) by decision dated 29 July 2016. At the same time, I made directions to prepare the case for hearing. The timetable, as is often the way, has slipped significantly. HMRC's evidence is now served, but not the appellant's.

3. HMRC have also made disclosure. At the previous hearing, I had allowed the appellant's application for standard disclosure (see §§119-125 of my decision) and by Direction 4 directed disclosure to be made not later than 11 November 2016 on the basis of CPR 31. HMRC's position is that they have complied with this direction.

4. On 12 October 2017, the appellant applied for a summary decision dismissing a part of the appeal and for further disclosure.

Application for summary decision

5. As I have said, the appealed decision was made on the basis of the CJEU decision in *Kittel*. To succeed, HMRC must show that the appellant's transactions were connected to fraudulent defaults and the appellant knew or ought to have known this at the time. HMRC alleged that some (about half by value) of the appellant's transactions in dispute were connected to fraudulent defaults by Barnsley Metal Company Ltd ('BMC') and it was to those transactions this application related.

6. The appellant's position was that the part of the appeal which related to the BMC supplies should be summarily allowed on the basis it had no real prospect of success under Rule 8(3). It said this for two reasons:

(1) assessments must be to best judgment and the appellant considered that HMRC would be unable to show that the assessment was to best judgment because they were unable to show that the assessing officer had formed the view that BMC's defaults were fraudulent;

(2) The appellant's position was that HMRC had not served sufficient evidence, even in the absence of rebuttal evidence, to satisfy the Tribunal that any defaults by BMC were fraudulent.

7. The appellant appeared to base these statements on the following matters:

(i) The HMRC officer, Ms Raglan, with responsibility for checking the VAT affairs of BMC, had served a witness statement in this appeal about BMC's VAT affairs but nowhere in it had she stated that is was her opinion that BMC had acted fraudulently;

(ii) Ms Raglan had penalised BMC on 5 June 2014 for defaults and calculated the penalty on the 'carelessness' rather than 'deliberate' scale;

(iii) Many of the BMC supplies at issue in this appeal took place before BMC had first defaulted;

(iv) As all the information about BMC (says the appellant) which HMRC says the appellant knew at the time of the transactions was also known to HMRC, yet HMRC did not stop BMC trading, it must indicate that at the time HMRC did not consider BMC to be fraudulent.

(1) The best judgment point

8. The assessment was made under s 73(1) which allows HMRC to raise assessments where returns are incorrect (as HMRC allege in this case). Such assessments must be to best judgment.

9. It is well established that to succeed in an appeal against an assessment on the basis that it was not to best judgment, the appellant must prove that the assessment was not to best judgment (eg see [38] (ii) of *Pegasus Birds*). That same sub-paragraph also makes it clear that the appellant must set out its case clearly in advance of the hearing on why it considers the assessment is not to best judgment.

10. Yet I was not shown anything by the appellant (apart from its summary judgment application) where it had set out its case that the assessment was not to best judgment on the grounds the officer making it did not conclude that BMC's defaults were fraudulent. Its notice of appeal refers to its case that the assessment was not to best judgement: but the grounds for making that allegation did not claim that the decision-making officer did not consider BMC's defaults fraudulent. It seems to me that this is a new ground of appeal that the appellant has only sought to rely on since receiving HMRC's witness evidence.

11. While the appellant can, of course, apply to amend its grounds of appeal to state this case, it most certainly cannot achieve summary judgment on such a case without giving HMRC the chance to respond to it. Justice is not arbitrary. A party must be given a chance to respond to a case against it.

12. Mr Chapman offered during the hearing before me to serve evidence by the officers concerned in this appeal setting out their opinions on whether BMC's defaults were fraudulent: Mr Firth said that serving such evidence now was much too late.

13. But so far as the appellant's new case on best judgment is concerned, it is not too late. HMRC is not required to respond or serve evidence in respect of a case that has not yet been made: the appellant needs to apply to amend its grounds of appeal if

it wants to pursue this new ground of appeal. And if that application is successful, HMRC will then have the right to respond to it, and serve evidence.

14. In any event, even if the appellant had properly pleaded its case on this, I would not give summary judgment against HMRC on it. The appellant's case rested on the fact that Officer Raglan did not state her opinion in her witness statement on whether BMC's defaults were fraudulent or not. But Officer Raglan was not the officer who raised the assessment at issue in this appeal: she was the officer tasked with responsibility for overseeing BMC's compliance. She raised the assessments on BMC but for those assessments to be valid and to best judgment, there was no requirement for her to form a view on whether or not BMC's defaults were fraudulent. And moreover those assessments did not need to be valid in order for the assessment at issue in this appeal to be valid.

15. The officer who raised the assessments at issue in this appeal was Officer Payne. While his witness statement does refer to evidence referred to in Officer Raglan's reports, he does not refer to or adopt her opinions. On the contrary, he states at §26 of his own witness statement that he assessed for the return of the input tax because he considered the appellant's transactions were connected with fraudulent evasion of VAT and the appellant knew or should have known of that. Moreover, his decision letter refers to the Commissioners forming the view that the appellant's transactions were connected to fraud.

16. There is therefore clear evidence that Officer Payne did form the view that BMC's defaults were fraudulent: it is of course open to the appellant (assuming that they amend their grounds of appeal) to test this evidence in cross examination. But I find there is a reasonable prospect of success of HMRC proving that Officer Payne's assessment was to best judgment in the sense that HMRC have a reasonable prospect of success of proving that Office Payne had formed the view at the time he made the assessment that BMC's defaults were fraudulent. I would not summarily determine this matter against HMRC even if the appellant had given HMRC an opportunity to respond to the allegation. It must go to trial and be tested in cross examination (if the appellant amends its ground of appeal).

17. Dealing specifically with the four matters on which the appellant's case rested outlined at §7 above, my view is that issues (i) and (ii) are irrelevant to the best judgment because, as I have said, Officer Raglan's opinion is irrelevant to the assessment on the appellant; and issues (iii) and (iv) are not relevant to the best judgment point because the question is whether the assessing officer had formed an opinion *at the time of the assessment* that the appellant's transactions were connected to fraud.

(2)Insufficient evidence to prove fraud by BMC?

18. The position is rather different in so far as the question of proof of fraud by BMC. It is HMRC's case that BMC's default was fraudulent. HMRC has the burden of proof. HMRC must have served sufficient evidence to raise a 'prima facie' case

that BMC's default was fraudulent. A 'prima facie' case is one that proves the thing alleged in the absence of any rebuttal evidence from the other party.

19. Mr Firth's position is that I should strike out the appeal in respect of the BMC supplies because (he says) the evidence served by HMRC to establish fraud by BMC is insufficient to raise a prima facie case. In other words, Mr Firth's position was that HMRC does not have a reasonable prospect, even in the absence of rebuttal evidence, of convincing a Tribunal that BMC's default was fraudulent.

20. The appellant's case that HMRC's case was thin rested on those matters listed at §7 above. I consider each in turn.

(i)Officer Raglan's opinion

21. As I have said, Officer Raglan was the officer with responsibility for checking BMC's compliance. Nowhere in her witness statement does she state her opinion on whether or not BMC's defaults were fraudulent.

22. However, as I have said, her opinion on this matter is quite irrelevant. The question is whether BMC's defaults were fraudulent: a Tribunal must make its own mind up on this matter of fact. It would be an error of law if it were to be influenced by the opinion of a witness of fact on this matter. If Ms Raglan had stated her opinion, in her witness statement, one way or the other, it would be quite irrelevant to the Tribunal's determination. Her failure to include her opinion in her witness statement is not something for which she should be criticised: witness statements by factual witnesses should include evidence of fact and should not include their opinions (save to the extent that their historic opinion is a relevant matter of fact).

23. I should not need to cite authority for the obvious proposition that opinions of witnesses of fact are irrelevant: nevertheless, there is recent authority. See [81] of *CCA Distributions* [2015] UKUT 513. The Upper Tribunal remitted that case because the FTT had, when forming its own conclusions, relied on what it thought was the opinions of other persons.

24. Mr Firth did not accept that Ms Raglan's opinion was irrelevant, and therefore that it was irrelevant whether or not she expressed it. But he is wrong. Her opinion is irrelevant to the decision the Tribunal must reach on whether or not BMC's defaults were fraudulent. Her failure to express her opinion does not make HMRC's case weaker or stronger.

(ii)The carelessness penalty

25. Even if I were to accept the premise that Ms Raglan's imposition of the carelessness penalty on BMC was evidence that at the time she had not formed the opinion that the defaults were fraudulent, her opinion is, for all the reasons given above, irrelevant. The question is whether the defaults were fraudulent, and the Tribunal would commit an error of law if it took into account Ms Raglan's views on the matter.

(iii) defaults postdate transactions at issue

26. Mr Firth pointed out that all of the supplies at issue in this appeal must have taken place before any default by the supplier (or its supplier) on its VAT liabilities in respect of those supplies took place; indeed, the majority of the supplies involving BMC took place before the first alleged default by BMC. He suggested that for this reason the appeal should be summarily allowed.

27. I think Mr Firth's point was that (in his view) the appellant could not know, at the time of the supply, that the supplier would fraudulently default on its VAT liability arising on that transaction, as the VAT liability would not be due for payment until at least 5 weeks after the time of supply.

28. But this does not follow. VAT is accounted for retrospectively, so any failure to account for VAT which was due necessarily only takes place after the supply has taken place. That the default took place after the supply is not directly relevant to the question of whether the default was fraudulent. That depends on whether the defaulter intended to default: such intention to default could have existed at the time of the supply.

29. It is possible for the supplier to have a fraudulent intent at the time of the supply, even if the intended default would not take place for some weeks after the time of supply. The question for the Tribunal is whether (a) the supplier did have such a fraudulent intent and (b) the appellant knew (or should have known) of such fraudulent intent at the time of supply. It is a question of fact.

30. It is clearly not impossible for a buyer to know of its supplier's fraudulent intent at the time of supply, long before the default takes place: that is true of every decision on appeal by this Tribunal in cases where MTIC fraud allegations have been made and the Tribunal's conclusion has been that the broker knew of the fraud. It is alleged by HMRC to be the position here. And I consider (see below at §§34-36) that there is evidence on which a Tribunal might reach that conclusion; it is not the position that HMRC's case necessarily has no reasonable prospect of success merely because the default took place after the supply.

(iv)HMRC knew all that the appellant knew and did not stop BMC trading

31. Again, even if I were to accept as correct Mr Firth's case that HMRC knew all that the appellant knew about BMC, and did not at that time consider BMC fraudulent, it is no more than a statement of HMRC's opinion at the time. HMRC's opinion of whether BMC's defaults were fraudulent is irrelevant to the question of whether or not BMC's defaults were fraudulent. (I accept HMRC's opinion is relevant to the question of best judgment, but I have dealt with that above).

32. It was also Mr Firth's position that because HMRC officers knew (he says) all that the appellant knew at the time and yet did not at the time conclude that BMC was acting fraudulently, then it would not be possible for HMRC to prove that the appellant knew or ought to have known that the defaults were fraudulent (assuming HMRC can prove that they were). But again, Mr Firth is assuming that the Tribunal will commit the error of law of putting weight on the opinion of HMRC officers. If connection to fraud is proved, the question for the Tribunal will be whether the

appellant knew or ought to have known of it: whatever opinions were held by HMRC officers at the time is not relevant.

33. What is relevant is whether what was known to the appellant meant that the appellant knew or should have known of the connection to fraud (if it is proved). That will require the Tribunal to examine what was known to the appellant: not what was known to HMRC.

Evidence insufficient?

34. In so far as it was the appellant's case that that the evidence served was insufficient to give rise to a prima facie case of fraud by BMC, I reject it. My opinion is that if HMRC can prove what they allege at §§31-50 of the statement of case, there is sufficient evidence on which a Tribunal could form the view that the defaults by BMC were fraudulent. Mr Firth did not suggest that HMRC had not served evidence to support the allegations.

35. Mr Chapman pointed out that a Tribunal has already formed the view that BMC's defaults were fraudulent: see *C F Booth* [2017] UKFTT 813 (TC) at §297. While strictly the view of another Tribunal is irrelevant, this paragraph certainly does not detract from the view I expressed in the previous paragraph.

36. In so far as it was Mr Firth's position that the evidence served was insufficient to prove a prima facie case of knowledge or means of knowledge by the appellant, then I reject it. If HMRC can prove what they allege at §89 (defective due diligence), §§91-95 (knowledge of previous defaults), then there is evidence on which a Tribunal might conclude that the appellant had knowledge or means of knowledge of fraudulent default (assuming the defaults are proved to be fraudulent). Mr Firth did not suggest that HMRC had not served evidence to support the allegations. The matter must go to trial.

Conclusion

37. For all the reasons above, I dismiss the appellant's application for summary judgment.

Application for disclosure

38. The appellant's application for disclosure was for disclosure for all documents, including but not limited to internal communications, notes, reports which related or referred to at least one of five specified companies. Those five specified companies were the appellant and 4 other companies, being companies mentioned in the statement of case and which was a supplier to the appellant or alleged to be a supplier to the appellant's supplier in the deal chains involving the alleged fraudulent defaults.

39. My decision in 2016 had anticipated that the disclosure exercise which I ordered to be carried out by HMRC (see §3 above) might be followed by an application for specific disclosure: but, with one exception, this was not an application for specific

disclosure. It was not application for a limited class of documents. It was, as Mr Firth accepted, an application for general disclosure.

40. Moreover, it seems that the appellant's purpose in making the application was not because the general disclosure already given had started off a train of enquiry which indicated that a specific class of documents would be relevant; on the contrary, it seemed the reason this further disclosure was demanded was because the appellant wasn't satisfied that the disclosure already given was sufficient.

41. Mr Firth said he did not allege that the disclosure exercise had been undertaken improperly (or at least not deliberately so), but that he felt the appellant ought to be able to check that they have been given all relevant information; ordering disclosure to the appellant of every document held by HMRC in which at least one of those five companies was mentioned would enable to the appellant to ensure it really had all relevant documentary evidence.

42. In the hearing, the application was slightly refined. There were two strands to it. Firstly, the appellant wanted all documents in which those five companies were mentioned as between HMRC and other persons because they were not satisfied that HMRC had disclosed all relevant documents and they wanted to check; secondly, HMRC had not disclosed its internal documents, being documents which would record HMRC's policy and opinions, and the appellant wanted those documents as well.

43. I therefore consider the application in two parts. The first I regard as an application for general disclosure of all 'external' documents (being documents passing between HMRC and other persons) which mention any one of those 5 companies; the second I regard as an application for general disclosure of all internal documents which mention any one of those 5 companies.

The application for external documents

44. I reject the application for general disclosure of the external documents.

45. The requested disclosure is extremely wide and far wider than even the old *Peruvian Guano Co* (1882) 11 QBD 55 test for CPR. *Peruvian Guano* disclosure was for documents which might reasonably be thought to advance the party's case or undermine the disclosing party's case, and for any other documents which might reasonably lead to a train of enquiry which might have either of those effects. The CPR has now stepped back from making such wide disclosure orders as a matter of routine. CPR standard disclosure is now only of documents which support the applicant's case or undermine the disclosing party's case. That was the disclosure I ordered in this case.

46. But what the appellant applies for now is all documents which mention any one of five companies, irrespective of whether the document advances its case, or undermines HMRC's and irrespective of whether it might reasonably lead to a train of enquiry which might have either of those outcomes. If I were to order such disclosure,

it would mean HMRC would be obliged to disclose irrelevant documents being documents which mention any one of those five companies but have no bearing in this appeal. Yet the appellant has no need of irrelevant documents and HMRC should not be put to the expense of producing them.

47. Secondly, the only reason put forward by Mr Firth to justify this request was the appellant's desire to ensure that it has all relevant documents held by HMRC. In other words, it wants to double check the disclosure of relevant documents HMRC has already made. Taking into account that the disclosure exercise is supervised by lawyers who are officers of the court, it is well-established that the other party does not have the right (at least in the absence of any well-founded suggestion that errors have been made) to see all documents held to ensure that all relevant documents have been disclosed. Here I can see no justification for a suggestion that the disclosure exercise carried out has been carried out incorrectly: Mr Firth did not even suggest it. The closest he came was in saying that HMRC's solicitors' views of relevance might not be the same as his and he thought the appellant should have the right to check. They do not.

48. Thirdly, this is a second bite at the cherry. The appellant successfully sought standard relevant disclosure in 2016: now it appears that it wants general disclosure in even wider terms. That means that HMRC has had to deal with two applications for general disclosure, and if the second application was successful, would have to undertake a second general disclosure exercise. Yet the appellant has given no explanation of why two general disclosure exercises should be conducted: it should have asked for the fullest disclosure it wanted the first time round, so that HMRC was only put to the expense of a general disclosure exercise once. Even if I thought that it was right to order a general disclosure exercise on the basis requested by the appellant, the appellant's failure to ask for it a year ago would suggest that it should only be ordered if the appellant paid for it on an indemnity basis.

49. For all these reasons, this part of the application is refused.

<u>The documents relating to the amount of BMC's default</u>

(a) To what legal issue would this evidence relate?

50. Mr Firth applied for disclosure of 'documents relating to the alleged defaulting trader's VAT position' because he said he wanted disclosure of documents that would enable the appellant to calculate the loss of VAT to HMRC in the transactions at issue in this appeal. In the hearing his point appeared to be that unless the Tribunal was satisfied that there was no double recovery, the appeal would have to be allowed. In the hearing, I indicated I was under the impression that there was binding authority that this was a bad point.

51. This led to Mr Firth applying for and being given the opportunity to make further representations on this as he did not accept that there was authority that HMRC did not have to prove that there was no double recovery. He made his submissions on 15 February; Mr Chapman replied on 28 February and Mr Firth responded on 1 March 2018.

52. In his response, Mr Firth said that the Tribunal and HMRC were mistaken in believing him to be making a point on double recovery: his point was, he said, that HMRC had to prove that there was a (fraudulent) loss and he did not accept that there had been a loss at all. He said this was clear from the disclosure application but I do not accept that as the two paragraphs to which he referred (§§17 and 36) refer to 'true loss' and wanting to know exactly how much input tax the defaulters could have claimed.

53. Nevertheless, I will deal with the application on the basis that either it was an application for disclosure of material relevant to double discovery or of material relevant to the question of proof of loss.

(b) Double recovery point

54. HMRC appeared to accept that they had not pleaded there was no double recovery; their position was that they did not have to in order to win the appeal. It was Mr Chapman's case that the evidence did prove that there was no double recovery but that the question was irrelevant.

55. I agree that the question is irrelevant. In *Mobilx* [2010] EWCA Civ 517 the Court of appeal ruled that:

> [65].....It is true that there may well be no correlation between the amount of output tax of which the fraudulent trader has defrauded HMRC and the amount of input tax which another trader has been denied. But the principle is concerned with identifying the objective criteria which must be met before the right to deduct input tax arises. Those criteria are not met, as I have emphasised, where the trader is regarded as a participant in the fraud.

Earlier, in *Calltell Telecom Ltd* [2009] EWHC 1081 (Ch) Floyd J had ruled [94]

> "there is no principle which requires HMRC to acknowledge a claim for repayment to the extent that the claim exceeds HMRC's tax loss".

56. And then in S*&I Electronics* [2012] UKUT 87 (TCC) the Upper Tribunal referred to §65 of *Mobilx* and said:

> [57] It is now clear, therefore, that the FTT was mistaken in thinking that input tax should be denied only to the extent of the tax loss. The position is rather that a trader who falls to be treated as a participant in tax fraud loses the right to any input tax credit, whatever the extent of the tax loss. It follows that, but for S&I's cross-appeal, we would have upheld HMRC's appeal and decided that HMRC had been entitled to disallow the relevant input tax claims in their entirety rather than merely to the extent of the proven tax loss.

57. In conclusion, there is binding authority that HMRC do not need to plead or seek to prove there was no double recovery. Therefore, documents relevant to that issue are not relevant.

(c) Proof of loss

58. Under the *Kittel* doctrine, HMRC do have to prove loss; they must also prove that the loss was fraudulent but what Mr Firth is seeking with this application, as explained in his post-hearing submissions, is documents that may show that there was no loss to HMRC. He considers that HMRC must disclose documents which show the defaulters' entitlement to input tax because that may demonstrate that there was no loss to HMRC.

59. As I understand it, the appellant's position is that it is possible BMC's suppliers were all VAT registered, all charged BMC VAT and issued valid VAT invoices, and BMC sold to the appellant at a loss (or at least no profit) on the net price. And that could be true of the other defaulter as well. The appellant's case is that legally, if those were the facts, there would be no loss to HMRC and so the question of whether BMC acted fraudulently, and whether or not the appellant knew or ought to have known about it, would be irrelevant and the appellant would win its appeal.

60. There would be a loss to HMRC if any of BMC's suppliers were not VAT registered or registrable, or if any of its suppliers failed to issue an invoice, or if BMC made a profit on the net price. This is because otherwise BMC would not be entitled to input tax at least equal to the VAT it failed to account for and there would be a loss to HMRC. I have already said that HMRC does not need to prove that the loss equals the assessment/input tax denial.

61. HMRC's point is that the defaulters and BMC in particular had no input tax entitlement whatsoever as (i) they failed to submit their VAT returns, a prerequisite under Reg 29 to a claim for input tax credit (ii) they did not hold valid VAT invoices and (iii) they were not entitled to input tax credit in any event as they knew or ought to have known their transactions were connected with fraud (presumably their own fraud).

62. I agree with the appellant that the failure to claim the input tax on a return is irrelevant to the question of loss to HMRC. If HMRC had already received the entire tax at issue in this appeal from the appellant's suppliers' suppliers, it is irrelevant that the appellant's suppliers did not claim the input tax on a return. HMRC would have no loss.

63. I also agree that Mr Chapman's point at §61 (iii) is not pertinent: it is circular. The appellant's suppliers could only be denied their input tax on *Kittel* grounds if their transactions were linked to fraudulent tax loss: so this point by HMRC is only a good point if there was a loss, the very thing which Mr Firth is seeking to challenge.

64. My conclusion is that the VAT invoices issued by the appellant's suppliers' suppliers in respect of the goods sold to the appellant in the disputed transactions are relevant because if the amount of them equalled or exceeded the amount of output tax on which the appellant's suppliers defaulted, that may indicate HMRC suffered no loss; moreover if the invoices showed that HMRC suffered only a small loss, that might bring into question whether the loss was intended (and therefore fraudulent).

65. So I agree that the appellant should have disclosed to them VAT invoices issued to any of the alleged defaulters which do or might relate to the goods which were supplied to the appellant in transactions the subject of this appeal. Those invoices are potentially relevant to the question of loss and possibly even to the question of fraud. What I am unclear about is the extent to which they have already been disclosed, because the parties have been addressing the much wider application made for all 'documents relating to the alleged defaulting trader's VAT position' and so it was never made clear whether the invoices have been disclosed.

66. The appellant has not justified the application in these much wider terms. I can see no relevance in any other documents, but I am persuaded that the appellant should have sight of the invoices to the extent that they have not already had them.

Internal documents

67. So far as the application for general disclosure of internal documentation is concerned, HMRC have taken the view that internal documents were not relevant and they have not disclosed them as part of the general disclosure exercise.

Relevance to *Kittel* case.

68. I agree with HMRC that HMRC's internal communications are not relevant to the case based on *Kittel*. The *Kittel* question is whether the appellant knew or ought to have known the transactions the subject of this appeal were connected to fraud, if indeed it is proved that they were. HMRC's contemporary opinions and policies are not relevant to that question.

69. Even if the appellant is right to say that at the time of the impugned transactions, HMRC had no suspicions that any of the five companies were involved in fraud, it is not relevant to the question of whether at the time the appellant knew or ought to have known that there was (if there was) fraud in its supply chain. The appellant seems to suggest it is relevant: if HMRC did not suspect, says the appellant, how can it be said the appellant ought to have known of fraud? But the question of means of knowledge is objective and is not tested against what HMRC suspected or did not suspect.

70. Mr Firth says it is clear that HMRC officers changed their views about the appellant: earlier visit reports (say the appellant) showed HMRC officers were satisfied with the appellant's mode of trading. Later those same officers made the accusation that the appellant knew or ought to have known its trading was connected with fraud. It has the right to know, says the appellant, how HMRC got from the one view to the other. It has the right to have its mind set at rest, says Mr Firth, that HMRC really did change its mind and why.

71. But the opinions of HMRC officers are simply not relevant to the question of whether the appellant actually knew or ought to have known of the fraud: what HMRC thought at the time or thought later (subject to the issue of best judgment) is not relevant to the determination which the Tribunal must make.

Relevance to allegation assessment not to best judgment?

72. Mr Firth's position was also that HMRC's assessing officer's views are relevant because it is now the appellant's case that the assessments were not to best judgment because (it says) the assessing officer had not genuinely formed the view that the supplier's defaults were fraudulent.

73. I have already commented that the appellant has not pleaded this case. The evidence of the opinion of the assessing officer on this matter is therefore strictly irrelevant because it is not actually a part of the appellant's case.

74. Nevertheless, I recognise that the appellant may seek to amend its grounds of appeal and if it does so successfully, I accept that the opinion of the assessing officer on the reason for the supplier's default may become relevant. So it makes sense to consider whether to order disclosure now: the appellant might fairly say that without the disclosure it won't know whether or not it can make out this case.

75. On the other hand, however, it is wrong to order disclosure where there is no real basis for an allegation: that allows one party to put the other to unnecessary expense and encourages nuisance disclosure applications. So there is a fine line to be drawn between what is a fishing expedition and what is a justified application. It was said by the Court of Appeal in *Shah v HSBC* [2011] EWCA Civ 1154 at [49] that there must be an 'evidential basis' for believing documents sought to be disclosed will contain relevant material. If there is not, it is a fishing expedition and disclosure should not be ordered.

76. Here, I do not consider that there is here any such evidential basis. The appellant alleges that Officer Payne's positive view of the appellant given a few years before his assessment indicates that his later assessment was not to best judgment: what evidence there is, however, is that he simply changed his mind about the appellant. There is no evidence to suggest that Officer Payne did anything other than change his mind: the fact that a few years before the officer expressed a qualified positive view of the appellant does not form an evidential basis for alleging that his later assessment was in bad faith. The application is therefore a fishing expedition. I refuse it.

Allegation of breach of duty by HMRC?

77. The appellant also suggested that it was a part of its case that HMRC owed it a duty to prevent fraudulent trading and that, if BMC's trading was proved to be fraudulent, the assessment on the appellant should be discharged because HMRC failed to prevent BMC's fraudulent trading. There would be, said Mr Firth, a breach of the appellant's legitimate expectations.

78. Putting aside that this does not appear to be a part of the appellant's pleaded case, it is clear that the Tribunal has no jurisdiction to determine whether HMRC was in breach of any public law duty to taxpayers. Such a complaint must be made, if at all, to the Administrative Division of the High Court in an action for judicial review. The jurisdiction of the Tribunal is plain: it must uphold the appellant's appeal unless it is satisfied that the appellant knew or ought to have known its impugned

transactions were connected to fraud. It is quite irrelevant to that determination for the Tribunal to consider whether HMRC could have done more to prevent fraudulent trading.

79. Mr Firth does not agree. He says that HMRC's (alleged) failures are relevant to the question of whether the appellant ought to have known of the fraud (if proved). I do not agree with him. If the appellant has constructive knowledge of the fraud, it must be denied the input tax despite any failings by HMRC.

80. Therefore, HMRC's policy papers are not relevant to the matter before the Tribunal: even if the policy papers might be relevant to the question of whether HMRC was in breach of its duty, as that is not a question this Tribunal can address, HMRC's internal papers are not relevant to these proceedings.

The spreadsheet

81. I note that one specific item of disclosure was requested in respect of Carwood: a spreadsheet. HMRC's position was that this had been disclosed and the application unfounded. Mr Firth appeared to accept that: however, if for any reason it appears the document has not been disclosed, the appellant is at liberty to revert to the tribunal.

Conclusion and Directions

82. I dismiss the appellant's application for summary determination of any aspect of this appeal.

83. I dismiss the appellant's application for disclosure in very large part, but to the extent that any remain undisclosed, HMRC are to disclose to the appellant any VAT invoices issued to any trader alleged to be in default in the statement of case where the invoices do or may relate to goods which were supplied to the appellant in the transactions the subject of this appeal.

84. The directions made following the previous hearing remain in force but need to be updated to deal with the slippage of time. HMRC have served their witness statements and made disclosure. It seems to me that the appropriate directions are now:

> (1) Not later than one month after the date of release of this decision the respondents shall disclose to the appellant to the extent that they have possession or control of them VAT invoices issued to any of the alleged defaulters which do or might relate to the goods which were supplied to the appellant in transactions the subject of this appeal (save to the extent that they have already been disclosed); or by the same date confirm (if true) to the appellant that all such documents in the possession or control of HMRC have already been disclosed.
>
> (2) Not later than two months after compliance with the above direction, the appellant shall send or deliver to the respondents statements from all witnesses on whose evidence it intends to rely at the hearing setting out

what that evidence will be and including as exhibits all documents relied on by the appellant in this appeal and shall at the same time notify the Tribunal that it has done so.

(3) Not later than two months after compliance with above direction (1), the appellant shall provide disclosure to the respondents as set out at CPR 31 (save to the extent the documents were disclosed by HMRC) and at the same time shall notify the Tribunal that it has complied with this Direction;

(4) Not later than two weeks after compliance with directions (2) and (3), both parties shall provide a time estimate and dates to avoid for a case management hearing to take place in a period of time between one and three months after the due date for provision of listing information. The Tribunal will set down this hearing shortly after the due date for compliance irrespective of whether either party provides its dates to avoid and an application for a postponement on the grounds that the dates are inconvenient is unlikely to succeed if the direction was not complied with. Either party seeking any particular case management direction should notify the other party and Tribunal of this no later than 2 weeks before the hearing; skeletons should be exchanged 7 days before the hearing.

85. 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.

BARBARA MOSEDALE
TRIBUNAL JUDGE

RELEASE DATE: 26 MARCH 2018