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MOBILE EXPORT 365 LTD & SHELFORD IT LIMITED v HMRC [2007] EWHC 1737 (Ch)

Burden of proof – Procedure – Application for strike out of a party's case due to failure to comply with direction – Appropriate conduct of litigation – Admissibility of evidence before the Tribunal – Overriding objective of the Civil Procedural Rules

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First published by De Voil Indirect Tax Intelligence, Issue 137, October 2007

This was an appeal to the High Court by the taxpayers, two associated companies engaged in wholesale trades in mobile phone in the so called "grey" market, against the refusal by the Tribunal to strike out the Commissioners' case and allow the taxpayers' appeals due to their failure to comply with Tribunal directions and late service of documents and witness evidence. The appeal came before Mr Justice Lightman within less than a month from release of the Tribunal decision. While the judgment is essentially procedural in nature, it clarifies a number of issues which will be likely to be relevant in many other cases, particularly as to conduct before the tribunal and admissibility of evidence before it.

The substantive dispute between the parties arose out of a number of transactions in mobile phones which the Commissioners maintain are tainted by "MTIC[1] fraud". Following extensive investigations into the transactions to which the taxpayers were part, lasting approximately a year, the Commissioners concluded, in a number of separate decision, that input tax repayment claims amounting to some £5.8M for Mobile Export 365 Ltd and £1.2M for Shelford IT Ltd should be refused because the underlying transactions were connected to a scheme to defraud the Revenue and both taxpayers knew or had the means of knowing that the transactions formed part of such a fraud.

[1] Missing Trader Intra-Community VAT fraud

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A 9-day trial had been fixed for 18th June 2007 and, on 12th April 2007 the Tribunal had issued a number of directions, including consolidation of a number of separate appeals by the taxpayers and a timetable for service of witness statements, giving the Commissioners 2 weeks to serve their witness evidence and the Appellants 4 weeks to serve theirs and requiring both parties to serve any additional list of documents within 2 weeks. While the Commissioners served their witness evidence in time, the Appellants sought to apply for an extension of a further 10 days, to 21st May 2007, for service of their witness evidence. The Commissioners opposed the extension. On 21st May 2007 the Appellants then wrote to the Commissioners stating that they would not be able to comply even with an extended deadline, which, in any event, had not been sanctioned by the Tribunal. The Commissioners did not serve any additional list of documents.

The first three witness statements, including some 5 lever arch files of documents, were not served by the taxpayers until 24th May 2007. One of the witnesses sought to provide something akin to an expert opinion on the existence of the so called "grey" market in mobile phones. There had been no warning that such evidence would be produced. A further lever arch file, including an additional witness statement and exhibits was then served on 4th June 2007. On 1st June 2007, the Appellants also served a specific disclosure application, requesting evidence concerning some 54 companies.

At the following direction hearing, already fixed for 5th June 2007, the Commissioners made an application that, by reason of the delay by the Appellants in serving their evidence and because of the extensive disclosure application, the date fixed for the substantive hearing should be vacated. Following an indication from the Tribunal that, if the disclosure application were to be granted, the proposed hearing date would be untenable, the Appellants abandoned the majority of their application for disclosure. The Tribunal then directed that the Commissioners serve their evidence in rebuttal by 13th June 2007 but, at the same time, acknowledged the difficulties that the Commissioners faced, due to the delay by the Appellants in serving their evidence.

The anticipated difficulties materialised and the Commissioners were unable to serve their evidence till 15th and 18th June 2007, the latter being the start day for the substantive hearing. The learned concluded that the Commissioners had provided a convincing explanation for the delay.

Shortly before the second day of the substantive hearing, counsel for the Appellants informed counsel for the Commissioners that he intended to oppose the admission of the late witness statements produced by the Commissioners. Once the Tribunal indicated that it was minded to admit the additional evidence, counsel for the Appellant, without prior notice, made an application under Rule 19(4) and 19(5) to enter judgment for the Appellant and effectively strike out the Commissioners' case, relying mainly on their failure to serve an additional list of documents.

The Tribunal refused the application and, in order to afford the Appellants a chance to properly consider the evidence, it indicated that it proposed to admit the evidence but that it would leave it open to the Appellants to challenge its admission at a later date and that it proposed to de-consolidate the appeal so that at least one of them could be concluded within the allocated 9 days set aside for the hearing. Counsel for the Appellant then indicated that it wished to appeal the refusal and did not agree with the Tribunal's proposal to proceed with one of the appeals.

In his reasoned judgment, which described the Appellants' appeal of the Tribunal's refusal to strike out as "hopeless", Lightman J made a number of points which are of wider importance than the immediate facts of this case.

Firstly, he remarked, albeit obiter, that the burden of proof in MTIC fraud cases falls in the first place on the Commissioners, who are required to prove, on the balance of probabilities, that there has been a fraudulent tax loss and that the relevant transactions are "connected with" that fraud. The burden then shifts to the taxpayer to show that it did not know and could not have known of the connection to the fraud. This is an important conclusion in the still developing jurisprudence following the ECJ decision in Case 439/04 *Kittel*. It is unclear whether the point was fully debated before the judge and it is possible that those conclusions may oversimplify the position. The learned judge's conclusions are not entirely consistent with those of the Tribunal in *Calltell Telecom Limited*

& Opto Telelinks (Europe) Ltd [VAT Decision 20266], where the point was fully argued and the Tribunal adopted a slightly more complex approach (see paras 67 and following of that decision). They are nevertheless further confirmation that, on the whole, a significant burden will fall upon Appellants in MTIC fraud cases in relation to their conduct and their state of knowledge.

In relation to the availability of a strike out, after wholeheartedly endorsing the approach of the Tribunal, the learned judge reiterated that "such a draconian order is very much a last resort where a party's conduct is of a serious nature and the prejudice to the applicant is not otherwise remediable", thereby confirming, once again, that the key test for the Tribunal to apply in such cases is that of prejudice to the other party, so that lesser sanctions (or indeed, no sanction at all) will, in most cases, be the appropriate course of action for the Tribunal to take. An important factor taken into account by the learned judge was also the fact that the Appellants' insistence on a hopeless appeal against the refusal to strike out, rather than proceeding with at least part of the substantive hearing before the Tribunal, was the cause of "the most grievous delay".

The learned judge then proceeded to provide some general guidance to the Tribunal in relation to the admissibility of evidence:

- Tribunals should decide once and for all whether to admit evidence, the presumption being that any evidence which is relevant should be admitted unless there is a compelling reason to the contrary;

- It is not open to Tribunals to admit evidence on the basis that it might later reverse that decision if it considers it just. The Tribunal must make a final decision either way. It is, of course, open to the Tribunal to read the evidence "de bene esse" in order to reach its final decision, but the availability of this course of action should not delay such final decision on admissibility longer than necessary.

While the above conclusions on the admissibility of evidence may seem obvious and would largely be regarded as standard in civil trials before the High Court, it is perhaps surprising that, up until now, those same principles of admissibility had not been applied by the Tribunal and that the learned Tribunal in the present case sought to achieve something akin to a "provisional" admission of evidence. The learned judge's conclusions now bring some clarity to the issue of admissibility of evidence before the Tribunal and, essentially, align it to that of evidence in other civil trials.

In this particular case, the learned judge also concluded, disagreeing in this respect with the Tribunal, that evidence of criminal convictions for MTIC fraud by one of the directors of the Appellants were of "substantial potential significance", as would be his failure to give evidence at the trial, given that much may turn on his involvement in the company in general and in the relevant transactions in particular. Such a conclusion, though obviously specific to this case, may well assist the Commissioners in adducing similar evidence of convictions for MTIC fraud in other cases.

Finally, the learned judge remarked unfavourable on the course of action adopted by counsel for the Appellant in seeking to surprise the Commissioner with an application to strike out without prior notice. In that respect, the learned judge made it clear that such conduct, calculated to catch the other party by surprise, is "not acceptable today in civil proceedings" and is contrary to the overriding objective of the CPR. Such conduct was not acceptable in any proceedings, whether governed by the CPR or not. This is an important clarification as, of course, Tribunal procedure is not governed by the CPR and is subject to its own rules.

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