[2017] UKFTT 620 (TC)

TC06056

Appeal number: TC/2014/06397

VALUE ADDED TAX - PROCEDURE - Denial of input tax on Kittel principles - 'Fairford' type directions seeking to clarify the issues - Whether those directions drawn to Appellant's attention? - Yes - Whether appellant failed to comply with those directions? - Yes - Whether those directions should have been set aside? - No - Whether later direction articulating effect of that failure to comply should be set aside? - No - Application dismissed

FIRST-TIER TRIBUNAL
TAX CHAMBER

MR ALAN MCCORD t/a HI-OCTANE IMPORTS **Appellant**

- and -

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

TRIBUNAL: JUDGE CHRISTOPHER MCNALL

Sitting in public at the Tribunal Hearing Centre, Royal Courts of Justice, Chichester Street, Belfast BT1 3JF on 9 June 2017

Mr Danny McNamee and Mr Neil Manley, both of McNamee McDonnell Solicitors, Newry, for the Appellant

Mrs Lucy Wilson-Barnes, Counsel, instructed by the General Counsel and Solicitor to HM Revenue and Customs, for the Respondents

DECISION

Introduction and Procedural History

1. This Appeal has a lengthy procedural history which, having given rise to the present application (2 December 2016) to set aside a direction made by Judge Bishopp on 1 December 2016, I must set out in some detail.

2. The Appellant is a car dealer. By way of a Notice of Appeal dated 28 November 2014, the Appellant seeks to appeal a decision, made on 12 September 2014 (and upheld by departmental review on 12 November 2014) refusing him the right to deduct input tax in relation to 16 transactions said to have occurred in the periods 09/12 and 10/12. The amount in dispute is approximately £64,000.

3. HMRC's decision to deny the Appellant's entitlement to deduct was on the basis that, in its view, those transactions were connected with the fraudulent evasion of VAT, and that Mr McCord either knew or should have known that to have been the case. Reliance was placed on the well-known judgments of the European Court of Justice in Axel Kittel, and Recolta Recyling SPRL.

4. The Grounds of Appeal state, in full:

> "*The Appellant has properly carried out all of the transactions which are refused by the Deciding Officer. The Appellant has paid the input tax in relation to each vehicle and has kept meticulous records in relation to same.*
>
> *The Appellant has complied with all the guidelines in relation to zero-rated sales and has no knowledge of or reason to believe any of these sales transactions were anything other than bona fide.*
>
> *The Appellant has retained sufficient data in relation to each transaction and customer to satisfy the requirements of the statutory guidelines.*
>
> *The Appellant is entitled to his input tax."*

5. On 8 December 2014, the Appeal was allocated to the standard track.

6. On 6 February 2015, the Respondents provided their Statement of Case. This is a long and detailed document. The substantive part comes to 83 paragraphs over 28 pages. There are also various appendices. Paragraph 33 is headed 'The issues before the Tribunal'. It identifies four issues: "(i) Was there a tax loss; (ii) If so, did this loss result from fraudulent evasion; (iii) If so, were Mr McCord's transactions which are the subject matter of this appeal connected with that fraudulent evasion; and (iv) If so, did Mr McCord know or should he have known that his transactions were so connected".

7. That is a conventional exposition of the accepted principles which govern cases of this kind, as articulated and explained by the Court of Appeal in *Mobilx Ltd v HMRC [2010] EWCA Civ 517*.

8. At that point, and on the face of it, those four issues were the four issues in dispute and for determination by the Tribunal.

9. HMRC's Statement of Case goes on (at Paragraphs 34 and following) to set out its case in detail, in relation to each of the four issues so identified. Paragraphs 62 to 82 inclusive set out, in appropriate detail, HMRC's case that Mr McCord either knew or ought reasonably to have known that the transactions were connected to fraud: i.e., the fourth issue. HMRC recognises that the burden on this issue falls on HMRC (even though it is the Respondent).

10. On 20 March 2015, the parties jointly applied for certain directions to be made. Paragraph 6 of these joint directions was that, by 27 August 2015:

> *"the Appellant shall serve on the Respondents and the Tribunal a notice of issues that it (sic) intends to contest, stating: (i) Whether he accepts there was a tax loss; (ii) Whether he accepts that the tax loss was fraudulent; (iii) Whether he accepts his transactions were connected to that fraudulent tax loss".*

11. That is, the parties, sensibly, jointly applied for directions aimed at clarifying the first three issues.

12. On 14 April 2015, the file came before the Registrar, who gave directions, but it seems not knowing of the joint application.

13. On 2 July 2015, the joint directions sought on 20 March 2015 were placed before the Tribunal (Judge Sinfield) and were approved by him, including the direction set out above. The directions so approved were issued on 7 July 2015. The Appellant was to serve his witness evidence by 2 July 2015, with liberty to serve evidence in response by 27 August 2015 (being the same date as the date for compliance with Paragraph 6).

14. Paragraph 6 of the parties' joint directions obviously derived some inspiration from the guidance given by the Upper Tribunal (Simon J and Judge Bishopp) in *Revenue and Customs Commissioners v Fairford Group plc (in liquidation) and another* [2014] UKUT 0329 (TCC). This was to the effect that Appellants in appeals of this kind should notify HMRC and the Tribunal of the issues in dispute in this appeal and in particular should confirm:

> *"Whether the Appellant accepts the transaction chains as set out in the deal sheets produced by HMRC in relation to the Appellant's purchases on which HMRC have denied input tax recovery accurately reflect the trading history of the goods bought and sold by the Appellant. If the Appellant does not accept the accuracy of the deal sheets, the Appellant should specify which chains it considers incorrect and why;*
>
> *Whether the Appellant accepts (without making any admission of knowledge or means of knowledge) that the Appellant's transactions were part of an orchestrated fraud;*

Whether, in respect of chains alleged to be directly connected with a defaulter, the Appellant accepts that there has been a fraudulent VAT default at the start of the chain;

Whether the Appellant accepts its transactions were connected to fraudulent tax loss."

15. In *Fairford,* the Upper Tribunal explained the rationale for the directions in this way (at [48]):

"In our view the appellant should additionally be required to provide reasons if the answer to any of the second, third and fourth of those questions is No. An appellant who advances a positive case will be required, by virtue of other customary directions, to set it out in witness statements or, if that is not practicable, in a response or a letter, or in some similar way. Accordingly, an appellant putting a positive case must disclose his hand in advance; we see no reason why an appellant merely putting HMRC to proof should be in a better position. If there is a real challenge to HMRC's evidence it should be identified; if there is not, the evidence should be accepted. We see no reason why an appellant who does not advance a positive case should be entitled to require HMRC to produce witnesses for cross-examination when their evidence is not seriously disputed. Such a course is wasteful not only of HMRC's resources but also of the resources of the FTT, since it increases the length of hearings and adds to the delays experienced by other tribunal users."

16. In *C F Booth Ltd v HMRC [2016] UKFTT 261 (TC)* Judge Berner, sitting in the First-tier Tribunal, considered those observations and remarked (at Para. [13]):

"Two aims can be discerned in the approach adopted by the Upper Tribunal. The first is that the appellant, as well as HMRC, should set out its case whether it advances a positive case or is merely putting HMRC to proof. HMRC is entitled to know which of the issues is in dispute, and the basis on which the relevant issues are disputed. The second is that if the appellant makes no positive case with respect to the issues specified in the directions, serves no evidence which challenges the evidence of HMRC's witnesses in those respects and does not identify the areas of dispute in that evidence, then the appellant will not be entitled to cross-examine those witnesses, whose witness statements will be accepted by the tribunal".

17. I respectfully agree with those remarks. For reasons which I shall develop below, they are especially pertinent to the circumstances of this appeal.

18. On 6 July 2015, Mr McCord filed and served a Statement. It deals, albeit in a short way, with each of the 16 transactions in dispute. It states that all the transactions were *'valid commercial transactions ... carried out in a highly diligent proper manner.'* Mr McCord states that he *'took extreme caution to ensure that all necessary paperwork'* was provided, and that he *'did not have, and indeed still do not have, any reason to believe that any of these transactions form part of a chain of transactions which involved any wrongdoing by any party'.* Mr McCord states that his trading was *'open, transparent and carried out with extreme due diligence'.*

19. The Appellant also made disclosure, with the disclosure relating to each transaction behind a separate tab.

The Appellant's Notice of Issues

20. On 26 August 2015 the Appellant's representatives filed a 'Notice of Issues', in ostensible compliance with Paragraph 6 of the joint directions.

21. It reads as follows:

> *"In compliance with Direction 6 the Appellant advises as follows:*
>
> *6.1 The Appellant does not accept that there was a tax loss;*
>
> *6.2 The Appellant does not accept that there was any tax loss which was fraudulent;*
>
> *6.3 The Appellant does not accept that is transactions were connected to any fraudulent tax loss.*
>
> *The Appellant states that without prejudice to the above matters that regardless as to whether it is established that there was a tax loss, fraudulent or otherwise, that the Appellant had no way of knowing or suspecting that there was such a loss. The Appellant conducted all matters in a highly competent and diligent manner and took all precautions that any diligent and responsible trader could.*
>
> *The Appellant states that he is entitled to his input tax regardless as to whether any of the transactions he was involved in can be linked at whatever remove to a transaction which the Revenue believe may have been fraudulent.*
>
> *The Appellant conducted his business in an entirely proper manner and took all precautions that are advised by HMRC in their guidelines and he is entitled to the return of his input tax"*

22. As such, HMRC was obviously being put to proof on all four issues.

23. This had a real bearing insofar as the parties were very far apart in terms of the estimated length of hearing - HMRC proposed attending with several witnesses, and estimated 4.5 days (later revised to 5 days). The Appellant proposed that the whole appeal could be heard in 1 day.

24. There then follows a period of almost 9 months - from September 2015 to July 2016 - in which little progress in listing the appeal seems to have been made.

25. On 20 May 2016, the Appellant's representatives wrote to HMRC agreeing that the appeal was governed by Kittel and Mobilx and that the burden was on HMRC. That letter went on to say:

> *"We do note that it is open to the Respondent's (sic) to invite the Appellant to narrow the issues in this case and we shall of course endeavour to do so. Upon receipt of the Respondent's Skeleton Argument in this matter we shall attempt to*

narrow the issues so as to ensure that the hearing in this matter is kept to as short a period as possible.

In the meantime however it appears to us that the Respondent should prepare to discharge its burden in relation to each of the elements involved in this Kittel refusal."

26. That letter has to be read against the background of the Appellant's Notice of Issues, set out in full above. The letter of 20 May 2016 provides no realistic assurance that any of the issues would be narrowed so as not to require determination by the Tribunal through the hearing and testing of evidence.

27. Moreover, for reasons which were not self-evident, and which were not explained to me at the hearing of this appeal, the Appellant's representatives seemed to have been affording great weight to what might in due course be said in HMRC's Skeleton Argument. In my view, this was not an appropriate approach to adopt. It elevates the Skeleton Argument to a status which it does not conventionally enjoy.

28. A Skeleton Argument is not a document produced by a witness and it is not evidence. Given the conventional function of a Skeleton Argument, it is hard to see what material or information of a novel or decisive character would have been likely to emerge in a Skeleton Argument which had not already emerged or had been identified either in HMRC's Statement of Case or HMRC's evidence (already, by that point, served). In short, the Appellant already knew what HMRC was saying, and why, and what its evidence was. I do not see what else was needed.

29. There is a further, obvious, and practical difficulty with the Appellant's intended approach. The Skeleton, in the ordinary course of things, was only going to be produced a relatively short time before the hearing of the appeal. But appeals are routinely listed months in advance. Hence, by the time the Skeleton was produced, the arrangements for the hearing of the appeal (for instance, the booking of the room in premises which are not exclusively occupied by this Tribunal, the appointment of the panel to hear the appeal, and perhaps their travel and accommodation arrangements) - would have been long since put in place.

30. If no issues had been narrowed beforehand, then that booking would inevitably have had to have been on the footing that 5 days were needed.

31. If it were really the case that the Appellant was waiting to see HMRC's Skeleton Argument before deciding what issues (if any) to narrow, then any such narrowing would necessarily come at a very late stage. If that happened, then the Tribunal could perhaps hear the appeal in less than 5 days. But that would mean that the Tribunal had unused capacity which could not be filled. Other appeals by other appellants, also needing to be heard and determined, could not be slotted into any time unexpectedly coming free at such a late stage.

32. Not only would listing for 5 days when less was in reality needed have squandered the Tribunal's resources - which are finite, and which are paid for by the public purse - but to wait until the eleventh hour before a multi-day appeal in order to 'narrow the issues' is not obviously consistent with the overriding objective, and the obligation on parties to co-operate with each other and with the Tribunal.

The Tribunal lists a case management hearing

33. It was doubtless concerns of this kind which prompted the Tribunal, on 29 July 2016, to write to both parties giving them notice of a preliminary hearing to be held 14 October 2016, with the expressly identified purposes including whether directions needed to be given in relation to "*1. The identification of the issues for determination in the appeal; 2. The agreement where possible by the parties of a statement of the undisputed facts*."

34. Against the above background, the approach taken by the Tribunal on 29 July 2016 was wholly intelligible, and was directed at a clearly expressed purpose. There was no mystery as to why the Tribunal was convening that hearing. Neither party sought to argue that no such preliminary hearing was needed. The Appellant did not seek to argue at the time that the issues for determination in the appeal had already been sufficiently well-identified, in the August 2015 Notice of Issues, so as to render a preliminary hearing of the anticipated kind useless.

HMRC's application of 7 September 2016

35. In obvious anticipation of that preliminary hearing, on 7 September 2016, HMRC made an application for directions. Those included the following:

> *"1. Within 28 days of the date of these directions, the Appellant shall clarify his notice of issues dated 26 August 2015 as follows:*
>
> *1.1. The Appellant shall state whether*
>
> *1.1.1. He accepts that the transaction chains as set out in the deal sheets produced by the Respondents (Annex C to the Statement of Case) in relation to the Appellant's purchases on which the Respondents have denied input tax recovery accurately reflect the trading history of the goods bought and sold by the Appellant? and*
>
> *1.1.2 If the Appellant does not accept the accuracy of the deal sheets, he is to state which chains he considers to be incorrect, and why;*
>
> *1.2 The Appellant shall state:*
>
> *1.2.1 The reasons he has for maintaining that he does not accept the existence of tax losses, whether occasioned by fraud or otherwise; and*
>
> *1.2.2 Shall further state, in relation to the witness statements served by the Respondents for each defaulting trader (i.e. Q Autos and Patrick McGourty) which, if any, are the matters of fact in dispute; and*
>
> *1.2.3 Shall further state, which, if any matters of fact are in dispute in relation to the other witness statement (Garth Armstrong) served by Respondents.*
>
> *1.3 Pursuant to 1.2.2 and 1.2.3 above, in respect of each of the Respondents' witnesses where there is no identified factual dispute then the evidence of each respective witness is to be given and accepted by the Tribunal in the form of*

each respective witness statement as previously served and that cross-examination of that witness will not be permitted."

36. Those directions are more closely aligned with *Fairford* than those originally jointly advanced by the parties. Those directions also marry with the stated purpose of the preliminary hearing.

37. The Application Notice set out Grounds for the Application. HMRC criticised the Appellant's Statement (6 July 2015) and the Notice of Issues (26 August 2015).

38. Direction 9 also provided that any party could apply at any time for those directions to be amended, suspended, or set aside.

39. Alongside its proposed directions, on 7 September 2016, HMRC emailed the Tribunal, copied to the Appellant's representatives, as follows:

"There is a pre-hearing review in this matter listed in Belfast for 14 October 2016. Please find attached an application by the Respondents.

To save time and costs, the Respondents (based in Manchester) wish to dial-in to the hearing by telephone rather than attend in person. Please can the Tribunal confirm if this would be possible/acceptable."

40. It is important to note the following:

(1) That email was copied to the Appellant's representatives (to two different email addresses) and there is no suggestion that it was not received;

(2) A scanned copy of HMRC's application already referred to was attached;

(3) The purpose(s) of the forthcoming hearing of 14 October 2016 had been made clear by the Tribunal in its Notice of Hearing. Those purposes included narrowing the issues, against a background where all four issues remained in dispute, without any clear timetable or mechanism proposed for them to be narrowed, and indeed no assurance that they ever would be;

(4) HMRC were not asking for the hearing to be vacated. The cover email simply asked if they could attend by telephone rather than in person. It was entirely clear that HMRC still expected the October hearing to be going ahead;

(5) HMRC were not, in the body of the email, requesting any formal direction (singular) let alone directions (plural).

The Tribunal's letters of 19 September 2016

41. HMRC's Application was placed before a Judge who gave instructions as follows, which are set out in a letter from the Tribunal dated 19 September 2016:

"I will make the directions requested and vacate the 14/10/2016 hearing, unless good reasons why I should not do so should be provided by no later than 7 October 2016."

42. The Tribunal sent a letter in those terms to the Appellant's representatives. It was attached to an email. The letter is clear: directions (plural) had been made and the hearing of 14 October 2016 had been vacated.

43. Therefore, and I so find, the directions requested on 7 September 2016 had been made by 19 September 2016 at the latest, including Directions 1.1, 1.2 and 1.3. The time for compliance with those directions was 28 days, which, taken most favourably to the Appellant, was 17 October 2016.

44. On 7 October 2016, HMRC wrote to the Tribunal (not copied, at least on the face of it, to the Appellant's representatives) that it had heard nothing from the Appellant, and asking if the Tribunal could confirm if the directions were in place, and whether the hearing on 14 October 2016 remained effective or had been vacated.

45. On 11 October 2016, the Tribunal wrote to all parties that *'The Tribunal has not received any response to previous correspondence dated 19 September 2016. The directions requested by HMRC in their application dated 7 September 2016 are now in place. The hearing scheduled for 14 October 2016 is therefore cancelled'*. That letter was sent by email to the Appellant's representatives. There is no suggestion that it was not received.

46. On 18 November 2016, HMRC wrote to the Appellant's representatives asking them *'to provide an update as we have not yet received clarification on your Notice of Issue in line with attached Directions'.*

47. On 18 November 2016, the Appellant's representatives responded that they had *'not received any directions from the Tribunal in this matter'.*

48. On 21 November 2016, HMRC responded that *'directions are in place, please see attached'.*

49. On 21 November 2016, the Appellant's representatives replied that '*we have not yet received any directions'.*

50. Insofar as it falls for me to do so within this Appeal, I make the following findings of fact:

(1) HMRC informed the Appellant's representatives of the directions which it was seeking on 7 September 2016;

(2) Directions were made by the Tribunal on 19 September 2016;

(3) Those Directions were as sought by HMRC on 7 September 2016;

(4) The fact that such directions had been made was brought to the Appellant's representatives' attention on 19 September 2016;

(5) The fact that such directions had been made was brought to the Appellant's representatives' attention again on 11 October 2016;

(6) The fact that such directions had been made was brought to the Appellant's representatives' attention again on 21 November 2016.

The Direction of 1 December 2016

51. The file came before Judge Bishopp, who, on 1 December 2016, ordered as follows:

> *"The appellant having failed to comply with paragraph 1 of the directions herein which became effective in the absence of objection by the appellant delivered on or before 7 October 2016* ***IT IS FURTHER DIRECTED*** *that:*
>
> *1. It shall be assumed at the hearing of this appeal that the deal sheets prepared by the Respondents and annexed to the Statement of Case are accurate in every respect and that the tax losses on which the Respondents rely occurred as stated by them, and no challenge by the Appellant to such matters shall be entertained;*
>
> *2. The Respondents may rely at the hearing of this appeal upon the witness statements of Garth Armstrong, Bernadette O'Neill, Lisa Wilkinson, and Paul Goodman served in this appeal and on the exhibits to those statements without calling the witnesses to give oral evidence and without tendering them for cross-examination, and no challenge to the accuracy of what is set out in the witnesses' statements shall be entertained".*

52. The only application before me is that articulated in Mr McNamee's email of 2 December 2016 at 13.46 which is that this direction should be 'withdrawn'.

Mr McNamee's email of 1 December 2016

53. Judge Bishopp's direction of 1 December 2016 was sent by email to the Appellant's representatives at 5.20pm that same day. That prompted an almost immediate response. At 6.03pm, Mr McNamee wrote to the Tribunal (not copied to the Appellant's representatives) as follows:

> *"I note the direction made by the Tribunal and advise that we had yesterday dictated a response to the earlier directions of the Tribunal. We advise however that we have never received a copy of the direction made by the Tribunal and were only alerted to the fact that directions were in place as a result of a request for compliance by the Respondents. We took immediate step to comply with the same. The replies are awaiting typing and will be with all parties before close of business tomorrow. We apologise for any misunderstanding. This is however not the first communication from the Tribunal that we have apparently not received over the past few weeks we do however ask the Tribunal to note that our emails make it clear that we do not accept service of documents by email and whilst we as a convenience do attempt to use internet services for the convenience of all parties we should also receive hard copies especially in circumstances where we are being held to be in breach. We would request that the Tribunal Judge revisit this matter and allow the replies which will be typed tomorrow to be received in this matter."*

54. On 2 December 2016, a document - coming to 2 sides of A4 - was filed on behalf of the Appellant, 'in compliance with the directions made by the Tribunal'. That document states, amongst other matters:

(1) The Appellant accepts the deal chains in Annex C (subject to 'minor discrepancies' in invoice numbers), but wished to rely on his own documents where there was any discrepancy between his documents and Annex C;

(2) The Appellant accepts 'in general terms' the Schedules in Annex C as accurate;

(3) The Appellant has no means of ascertaining whether any tax losses were occasioned, whether by fraud or otherwise;

(4) The Appellant could neither accept nor deny whether the traders had defaulted;

(5) The Appellant disputes the evidence of Gareth Armstrong.

55. As to the latter, it is important that I set out what is said in full, and as it appears:

> *"The Appellant would state that any fact or inference being drawn by Mr Armstrong with a view to impugning the Appellant's transactions as regards any of these vehicles is at issue in this matter. Hence any interpretation that Officer Armstrong would have in relation to documents uplifted from third parties which would purport to indicate that the Appellant's transactions either did not take place or did not take place at the time and in the manner which the Appellant claims are in dispute in this matter. As appears to be common in many of these cases, Officer Armstrong has sought to rely upon the documents of third parties, who appear themselves to be either missing or defaulting traders, with a view to contrasting the details on those documents with the details of the Appellant's transactions. In this regard the Appellant does not and will not accept the facts set out by Officer Armstrong. If however the details set out by Officer Armstrong are merely set out to show the existence of other purported transactions which may in themselves be fraudulent or non-existent the Appellant takes no issue with these matters as they were matters outside his knowledge or his ability to become aware of. However the Appellant does not accept any inference that may be sought to be drawn from the existence of such documents in relation to the bona fides of his transactions. The Appellant would be happy to narrow any issues further upon receipt of the Skeleton Argument of the Respondent. It is to be hoped that the detailed Statement of the Appellant already provided and the supplementary documents which under pin this statement would provide in the clearest terms the Appellants Grounds of Appeal".*

56. HMRC argues that this response - and irrespective of whether it is late or not - fails in any event to comply with the directions made on 19 September 2016.

57. I agree. This thicket of words - replete with qualifiers, caveats, and negatives - is nigh-on impenetrable. Despite careful reading and re-reading, and trying to put myself, so far as I can, in the position of those who will eventually be called upon to determine this appeal, I have not been able to make sufficient sense of this passage to properly assess what the Appellant's position really is in relation to any of the four issues, but most particularly in relation to the fourth issue. That has a bearing on the case management which will have to be undertaken at the hearing of the appeal, the evidence which will have to be heard, and the length of hearing.

58. To my eyes, the response is confused and confusing. Hence, as it stands, it is an obvious impediment to the orderly progression of this appeal. It conforms neither to the spirit nor to the letter of directions. The Appellant's representatives - again - have resort to the suggestion that the issues could be narrowed when the Skeleton Argument appears. For the reasons already set out, I reject that approach. It is unorthodox, and wrong.

59. I do not accept the Appellant's submissions that he has complied in full with the directions. The Appellant does not state, adequately or consistent with the letter or spirit of the directions:

(1) In relation to the deal sheets which he does not accept to be accurate, *'which chains he considers to be incorrect, and why'* (contrary to Direction 1.1.2);

(2) *'The reasons he has for maintaining that he does not accept the existence of tax losses, whether occasioned by fraud or otherwise'* (contrary to Direction 1.2.1)

(3) *'In relation to the witness statements served by the Respondents for each defaulting trader (i.e. Q Autos and Patrick McGourty) which, if any, are the matters of fact in dispute'* (contrary to Direction 1.2.2);

(4) *'which, if any matters of fact are in dispute in relation to the other witness statement (Garth Armstrong) served by Respondents'* (contrary to Direction 1.2.3).

Discussion

60. Mr McNamee accepted (as he was bound to) that the Tribunal's general approach to compliance with directions is subject to the binding guidance given by the Court of Appeal in *BPP Holdings v HMRC* [2016] EWCA Civ 121. That guidance has very recently (26 July 2017) been affirmed by the Supreme Court: [2017] UKSC 55.

61. The leading judgment in the Court of Appeal was given by Sir Ernest Ryder, the Senior President of Tribunals, who, having considered the approach to compliance in our sister civil jurisdictions, remarked:

> "It should not need to be said that a tribunal's orders, rules and practice directions are to be complied with in like manner to a court's. If it needs to be said, I have now said it ... A more relaxed approach to compliance in tribunals would run the risk that non-compliance with all orders including final orders would have to be tolerated on some rational basis. That is the wrong starting point. The correct starting point is compliance unless there is good reason to the contrary which should, where possible, be put in advance to the tribunal. The interests of justice are not just in terms of the effect on the parties in a particular case but also the impact of the non-compliance on the wider system including the time expended by the Tribunal in getting (parties) to comply with a procedural obligation. Flexibility of

process does not mean a shoddy attitude to delay or compliance by any party."

62. Mr McNamee's primary argument, as I understood it, was that the Fairford directions had never actually been drawn to the attention of his firm and that, where a party never been made aware of the directions in the first place, it could not properly be penalised for any failure to comply.

63. I did not apprehend that latter proposition to be controversial or opposed by HMRC. But I am entirely satisfied that the Tribunal's correspondence of 19 September 2016 and 11 October 2016 were sent to the Appellant's representatives and the directions were drawn to the attention of the Appellant's representatives. For the sake of completeness, I should add that because HMRC was not the author of those letters, it was not in a position to satisfy itself whether that had been done. But I am in such a position, since copy letters marked as sent appeared on the Tribunal's file.

64. Even if (which I do not accept) the fact of the making of the directions and their content did not come to the attention of the Appellant's representatives until 21 November 2016, it would have been absolutely clear, at that point, that work needed to be done very urgently to comply. But a gap of 10 or so days ensues until the document of 2 December 2016 emerges. The sole explanation advanced is that the document was awaiting typing. Even if I accepted the Appellant's position as to when the directions came to their attention (which I do not) I do not accept that explanation as a reasonable one. In any event, the document of 2 December 2016 is not a lengthy one. Moreover, once effort is made to disentangle it, it contains little which is genuinely new, but in substance largely recapitulates the earlier Statement and Notice of Issues.

65. Mr McNamee was critical that the Tribunal's directions had never been expressly framed as such - that is, in a separate document (and not in a letter) with the heading 'Directions'. I reject this argument. The clerical or administrative approach which has been adopted by the Tribunal in this appeal is one widely adopted in this Tribunal (and, speaking from my own knowledge and experience, in other Tribunals, and the County Court).

66. The thrust of Mr McNamee's argument in this regard is one which focuses unduly on form, and fails to give proper weight (indeed, fails to give any weight) to substance. The Tribunal had given directions. The form in which those directions were cast was, in my view, not material to any question of compliance. I do not consider that the letters of 19 September 2016 or 11 October 2016 (even if, as Mr McNamee described them, as 'terse') had any arcane meaning or bore any ambiguity. Their meaning was both unambiguous and obvious.

67. Even having due regard to the everyday workloads of busy solicitors, and acknowledging that solicitors may well have to delegate, and are correspondingly reliant on 'back office' and administrative support, I am nonetheless of the view that the correspondence referred to, read reasonably, was sensibly capable of bearing only one meaning. That was that the directions set out in HMRC's application of 7 September 2016 had been made.

68. It is not clear to me, even now, what misunderstanding is said to have arisen in the minds of the appellant's representatives. Even if, and giving them the benefit of the doubt, then, even if there were some misunderstanding, it was not, in my view, a reasonable misunderstanding so as to permit me to find that the directions had not been drawn to the attention of the appellant's representatives.

69. I reject the argument, pressed forcibly on me, that the appellant's representatives considered the reference to 'directions' (and NB the plural) referred to an application by HMRC to participate in the matter of the proposed Fairford directions by telephone. The argument is without merit.

70. Firstly, there was no such application. All HMRC had asked was to participate in the case management hearing of 14 October 2016 by telephone. That was obviously on the footing that the hearing would be going ahead. But, as the appellant's representatives knew - since they were told - that hearing was subsequently vacated. No sensible explanation was forthcoming from the Appellant's representatives as to how, if that was genuinely their belief, they did nothing to explore the position either with the Tribunal or HMRC. Moreover, it simply makes no sense (nor is it obviously consistent with the overriding objective) for a substantive case management hearing to be vacated in its entirety simply in order to convene another hearing (whether by telephone or not is unclear) simply to decide whether the substantive case management hearing should go ahead with one side participating by phone or not. If this is the Appellant's argument, then, to my mind, it approaches the absurd.

71. Secondly, if the appellant's position was genuinely that he opposed the making of Fairford directions, then this is plainly inconsistent with what actually happened. That is to say, when the Appellant's representatives were, on their account, explicitly made aware, on 22 November 2016, that the Fairford directions had been made, their response was to purport to comply with them - albeit at rather a leisurely pace - rather than applying to set them aside.

72. It cannot be ignored that the Appellant's present application only emerged on 1/2 December 2016, and I conclude and so find that it was triggered by the order dated 1 December 2016 which articulated the position which the Appellant was in, having failed to comply with the Fairford directions, and which doubtless drove home the situation which the Appellant faced.

73. Before me, Mr McNamee did not seek any extension of time (in effect, to 2 December 2016) for compliance with the directions of 19 September 2016. Indeed, he vigorously disavowed any such application. He did not seek to argue that his firm had simply not been quick enough to comply with the Fairford directions, and had been caught unawares when the order of 1 December 2016 appeared. Rather, the appellant's position before me, advanced through Mr McNamee, was that the directions of 19 September 2016 should not have been made in the first place.

74. In my view, this submission faces, and does not succeed in overcoming, a number of serious difficulties.

75. The first difficulty is that no application has ever been made to set aside the directions of 19 September 2016. The application of 2 December 2016 is limited to setting aside Judge Bishopp's order of 1 December 2016. But Judge Bishopp's order is, in reality, nothing more than an articulation or description of the effect of the then-extant failure to comply. Those consequences had already happened. Absent any application for an extension of time, then this application, even if successful, accomplishes nothing worthwhile (and certainly nothing meriting the expense and delay of the fully-fledged hearing which was held).

76. The second difficulty is that the Upper Tribunal has expressly endorsed the use of Fairford directions in cases of this kind. Mr McNamee argued that the Fairford directions were intrinsically unfair. But, although Mr McNamee appeared to doubt the proposition, I am bound by decisions of the Upper Tribunal. Although Mr McNamee pressed me to identify the proposition(s) of law for which Fairford stands as authority, it simply suffices for me to say that I am bound by Fairford, and that Fairford is good law.

77. The third difficulty is that Mr McNamee did not, despite my repeated invitations to him, seek to advance any focussed argument that Fairford directions should not, *as a matter of case management*, have been made in *this* case, and that, for that reason, and if I had the power to do so, should therefore be set aside by me, as part of my overall case management powers.

78. That was perhaps a recognition that the Note of Issues of 26 August 2015 was not adequate. The force tending to the making of Fairford directions in this case, as a proper exercise of the Tribunal's discretionary case management powers, was simply irresistible. That is to say, the way in which the Tribunal regarded the Note of Issues, as an important part of the context behind the making of the directions sought on 7 September 2016, was and is unimpeachable.

79. The fourth difficulty, which remains even if my conclusions on all the above fall to be disturbed, is that the document which was filed on 2 December 2016 in any event fails to comply with the Fairford directions anyway. Whilst the appellant, albeit somewhat equivocally, seems to accept that there was a tax loss, his position is far less clear in relation to whether he accepts that the loss resulted from a fraudulent evasion, whether the transactions which are the subject of this appeal were connected with that evasion and whether the appellant knew or did or should have known that the transactions were so connected.

80. In my view, the Appellant's purported compliance, even latterly, and even if I had been asked (which I was not), and had been prepared (which I would not have been), to extend time to 2 December 2016, is still manifestly inadequate and does not satisfactorily address the directions made on 19 September 2016.

Decision

81. Therefore, the application to set aside the directions dated 1 December 2016 is dismissed.

Case Management Directions

82. By virtue of the Tribunal's orders, the position is now clear.

83. HMRC and the Appellant shall each, within 14 days of the date upon which this Decision is sent to them, provide the Tribunal with an estimated length of hearing (it being anticipated that the principal component of such hearing will now be cross-examination of the Appellant, since his witness statement stands as his evidence-in-chief), a draft trial timetable, and dates of unavailability for a six-month window, whereupon this appeal shall be listed to be heard in Belfast. In the event of disagreement as to the length of hearing, the file, as well as this Decision, shall be placed before a Judge of the Tribunal.

84. This document contains full findings of fact and reasons for the preliminary decision. Any party dissatisfied with this preliminary 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. However, either party may apply for the 56 days to run instead from the date of the decision that disposes of all issues in the proceedings, but such an application should be made as soon as possible. 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.

DR CHRISTOPHER MCNALL
TRIBUNAL JUDGE

RELEASE DATE: 09 AUGUST 2017