TC07925

Procedure – Respondents application for order that appellant and its director be jointly and severally liable to pay costs of and incidental to appeal – Whether Tribunal has jurisdiction to make costs order against non-party – Yes – Whether such direction appropriate having regard to circumstances of the case – Yes – Whether party entitled to rely on unavailable decision – No – Application allowed

FIRST-TIER TRIBUNAL
TAX CHAMBER

Appeal number: TC/2016/00959

BETWEEN

EUROCHOICE LIMITED **Appellant**

-and-

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

TRIBUNAL: JUDGE BROOKS

Determined on the papers without a hearing

DECISION

INTRODUCTION

1. The respondents ("HMRC"), by an application dated 8 July 2020, seek a direction that the Appellant, Eurochoice Limited (the "Company") and its director, Mr Salman Ahmed, be jointly and severally liable to pay HMRC's costs of and incidental to this appeal in the sum of £18,193.60 as set out in the schedule attached to the application.

BACKGROUND

2. On 13 October 2015 HMRC notified the Company of the decision to refuse it the right to deduct input tax in the sum of £5,843,093.00 and raise a corresponding VAT assessment in respect of its VAT accounting periods 10/13, 01/14, 04/14 and 07/14 on the basis that the Company knew or should have known that the transactions concerned were connected with a fraudulent loss of tax. The Company appealed to the Tribunal on 12 February 2016 on the following grounds:

> "6 … firstly, on the basis that the reasoning of the Commissioners is not sustainable:
>
> a. In an attempt to justify the conclusion that the Appellant knew and/or should have known that his transactions(s) were connected with a fraud, HMRC relies upon the fact that the Appellant carried out its transaction(s) without having seen the goods in question.
>
> b. In so concluding, HMRC has failed to take account of the fact that it is not uncommon, in the alcohol industry (especially where trade is carried out under-bond) for traders not to physically see any of their goods. It is frequently the case that goods are held in bond under the account of company X and then switched to the account of company Y in the same bond for onward sale. Despite having placed an order from Company C, Company Y may never in fact see the goods that it has purchased and subsequently sold on.
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> c. Further, the simple fact that the transactions were carried out in this way is not supportive, nor is it good evidence, of the fact that these trades were linked to the alleged fraud.
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> 7. The evidential basis of the conclusion that the Appellant's trade was linked with fraud is lacking. The assertions made in the fourth, five [sic], seven and eighth bullets [sic] points on page 5 of the Decision dated 18 January 2016. More specifically, non [sic] of the factors listed therein are conclusive of the fact that the Appellant either knew, or ought reasonably to have known, that the supplies made were connected with fraud. The burden of establishing knowledge, constructive or otherwise, vests with the Commissioners: "In accordance with established principles if it is going to be alleged that there was wrongdoing or failure to take reasonable care the burden is on the party which alleges that. That party in question is HMRC and it is not for the trader to prove that he was not fraudulent nor that he had taken reasonable precautions to avoid being involved in fraud." [24] [See *Commissioners v Infinity Distribution Limited (in administration)* [2015] UKUT 0219 (TCC)]
>
> In all of the circumstances of the case, Eurochoice held sufficient evidence to establish its rights to the deduction of input tax; none of the evidence relied upon by the Commissioners is capable of establishing the contrary."

3. On receipt by the Tribunal, the appeal was allocated to the "complex" category in accordance with Rule 23 of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules

2009 (all subsequent references to Rules are, unless otherwise stated, to these Procedure Rules). The effect of such an allocation was that the case was subject to the full cost shifting regime unless the Company gave notice under Rule 10 that the case be excluded from potential liability for costs. No such notice was given by the Company.

4. On 4 February 2019 Mr Ahmed, who has been the sole director and shareholder of the Company since 1 February 2012, pleaded guilty to one count of cheating the public revenue and one count of conspiracy to commit money laundering, offences that related to transactions undertaken (including those with which this appeal was concerned) by the Company between 1 January 2013 and 31 January 2015. On 24 May 2019, he was sentenced to 5 years and two months' imprisonment.

5. On 5 September 2019 HMRC applied to the Tribunal for a direction to strike out the appeal, under Rule 8(3)(c), on the grounds that it had no reasonable prospects of success. In the absence of any response to its letter, dated 8 November 2019, inviting representations on HMRC's application, the Tribunal issued an "unless" order to the Company directing the Company to confirm in writing by no later than 30 January 2020 that it intended to proceed with its appeal. The Company was warned that if no response was received the appeal may be struck out without further reference to the parties. As no response was received within the time stated or at all, and because of the failure to co-operate with the Tribunal to such an extent that it was unable to deal with proceedings fairly and justly, on 4 March 2020, Judge Geraint Williams struck out the appeal.

6. On 8 July 2020 HMRC made this application for costs. Following receipt of this application the Tribunal wrote to the Company's solicitors on 18 August 2020 inviting representations in response within 14 days. In the absence of any reply to that letter, on 16 October 2020 a further letter was sent by the Tribunal enclosing a copy of the 18 August 2020 letter. Neither the Company nor Mr Ahmed responded within the seven days required by that letter or at all.

LAW

7. Section 29 Tribunals Courts and Enforcement Act 2007 ("TCEA") provides:

> (1) The costs of and incidental to—
>
> (a) all proceedings in the First-tier Tribunal, and
>
> (b) all proceedings in the Upper Tribunal, shall be in the discretion of the
>
> Tribunal in which the proceedings take place.
>
> (2) The relevant Tribunal shall have full power to determine by whom and to what extent the costs are to be paid.
>
> (3) Subsections (1) and (2) have effect subject to Tribunal Procedure Rules.

8. As already mentioned, this appeal had been allocated to the "complex" category and, as the Company did not opt out of the costs regime under Rule 10(1)(c), the full cost shifting regime applies subject, under s 29 TCEA, to the discretion of the Tribunal.

9. In *Versteegh Limited and others v HMRC* [2014] UKFTT 397 (TC) the Tribunal (Judge Berner) said, at [10]:

> "In the context of the First-tier Tribunal as a whole, a full costs-shifting jurisdiction is an unusual feature. There is, as a consequence, no detailed guidance in the Tax Tribunal Rules as to the exercise of the Tribunal's discretion in this respect. This particular costs jurisdiction has more in common with that applicable in the courts, and accordingly it is clear to me,

> and indeed it was common ground, that the principles applicable under the Civil Procedure Rules ("CPR"), and the relevant authorities in that respect, are equally applicable to the exercise by this Tribunal of its power to award costs. These are a reflection of the same overriding objective, namely to deal with cases fairly and justly."

10. Part 44.2 of the Civil Procedure Rules ("CPR") provides:

> "(1) The court has discretion as to—
>
> (a) whether costs are payable by one party to another;
>
> (b) the amount of those costs; and
>
> (c) when they are to be paid.
>
> (2) If the court decides to make an order about costs–
>
> (a) the general rule is that the unsuccessful party will be ordered to pay the costs of the successful party; but
>
> (b) the court may make a different order. …

11. Under Rule 10(4), any application for costs may not be made "later than 28 days after the date" on which the Tribunal sends notice recording the decision that finally disposes of all issues in the proceedings. However, Rule 10(5) provides that the Tribunal may not make an order for costs against "the paying person" without first:

> (a) giving that person an opportunity to make representations; and
>
> (b) if the paying person is an individual, considering that person's financial means…

12. The amount of costs may, under Rule 10(6) be determined by way of summary or detailed assessment if not agreed.

ISSUES:

13. The following issues arise out of this application:

> (1) whether, given that the direction striking out the appeal was issued on 4 March 2020 and the costs application was made on 8 July 2020, HMRC's application was made in time;
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> (2) whether a costs order should be made against the Company;
>
> (3) whether the direction sought, that its director, Mr Salman Ahmed, be jointly and severally liable to pay costs should be granted.

Whether application in time

14. As the strike out direction of 4 March 2020 disposed of the proceedings in this appeal any application for costs should have been made within 28 days ie by 1 April 2020.

15. However, because of the effect of the coronavirus pandemic, on 24 March 2020 the President of the Tax Chamber of the First-tier Tribunal issued a Directions for a General Stay for 28 days. Directions for a further general stay were issued by the President on 21 April 2020 staying all proceedings issued before 24 March 2020 until 30 June 2020, and extending all time limits in those cases for a further 70 days. Although there were specific exceptions to this none apply to this appeal. Therefore, taking into account the effect of the General Stay Directions, the date by which a costs application had to be made was extended to 8 July 2020.

16. Rule 12 provides that where an act required by the Rules is to be done on a particular day it must be done before 5pm that day. HMRC's application for costs was received by the Tribunal at 4:39pm on 8 July 2020. Accordingly the application was made in time

Costs against Company

17. There can be no dispute that, as the Company's appeal was struck out, HMRC was the successful party. In the absence of any response by the Company to the Tribunal's letters seeking representations on HMRC's costs application I can see no reason to depart from the general rule as stated in Part 44.2 CPR, that the unsuccessful party will be ordered to pay the costs of the successful party and shall direct accordingly.

Costs against director

18. HMRC contend that as Rule 10(1)(c), unlike Rule 10(1)(b), does not refer to "a party or their representative" the Tribunal has the power to direct that a non-party, such as Mr Ahmed, pay the costs of the proceedings. In support they cite an unpublished decision of Warren J in the Upper Tribunal. However, it is recognised that this authority was unlikely to be available to the Tribunal and the other parties and therefore, on 19 October 2020, HMRC provided a copy of the decision.

19. However, this raises an issue of whether a party, and in a tax case it will usually be HMRC as it is a party to almost every case before the Tribunal, should be permitted to rely on an authority that was unavailable to the other party.

20. This issue arose in *Ardmore Construction Limited v HMRC* [2014] SFTD 1077 (Judge Brooks and Mr Stafford). Although the decision in *Ardmore* was subject to further appeal this particular issue was not considered in either the Upper Tribunal or Court of Appeal. In *Ardmore* HMRC sought to rely on an unpublished decision of the Special Commissioners, *Poldi (UK) Limited v Inland Revenue Commissioners* ("*Poldi*"). Counsel for the appellant submitted (recorded at [11] of *Ardmore*) that:

> "… there were three main reasons why an unpublished decision should not be cited: first to ensure a fair trial (equality between HMRC and the taxpayer); secondly, the rule of law dictates that the law should be known; and thirdly the practice of the courts."

21. Notwithstanding HMRC's argument that there was no "inequality of arms" as HMRC had provided a copy of the unpublished decision to the appellant together with an assurance that none of the officers or lawyers with responsibility for this case nor any of the applicable policy leads, nor HMRC's counsel was aware of any other relevant unpublished decision, helpful or unhelpful to HMRC and should they become aware of any such other decision it would be placed before the Tribunal, we concluded that:

> "20. As HMRC (or its predecessor, the Inland Revenue) would always have been a party to a tax appeal the position would be as stated in the letter, of 6 June 2013, sent by HMRC to the directors of Poldi, under its new name, seeking consent to rely on the unpublished decision of the Special Commissioner, ie that:
>
> > 'HMRC has copies of all decisions made in the various tax courts, because, of course, it is always a party to such proceedings. … This means that HMRC has the ability to draw upon some decisions of the tax courts that are not freely available to the general taxpayer.'
>
> This clearly raises the question of fairness and whether HMRC should be permitted to rely on an unpublished (as opposed to an unreported) decision not freely available to the general taxpayer, especially as we are obliged to

> give effect to the overriding objective, contained in Rule 2 of the Tribunal Procedure (First-tier Tribunal)(Tax Chamber) Rules 2009 (the "Tribunal Rules"), to "deal with cases fairly and justly" which includes dealing with a case in ways which "are proportionate" to the "resources of the parties".
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> 21. Given that the judicial function of the Special Commissioners was originally derived from s 130 and s 131 of the Income Tax Act 1842 there must be thousands of unpublished decisions known by and available only to HMRC. In our view, given that a persuasive authority, unless considered to be wrong, will as a matter of judicial comity be followed by the FTT, it cannot be right or just for HMRC to have such an advantage over a taxpayer. As Lord Diplock said in *Fothergill v Monarch Airlines Limited* [1981] AC 251 at 279:
>
> > "Elementary justice or, to use the concept often cited by the European Court, the need for legal certainty demands that the rules by which the citizen is to be bound should be ascertainable by him (or, more realistically, by a competent lawyer advising him) by reference to identifiable sources that are publicly accessible."
>
> 22. Therefore, irrespective of any assurance that may be given, we do not consider that it is proper for HMRC to cite an unpublished decision of the Special Commissioners before the FTT."

22. Similarly in the present case I consider that it would not be proper for HMRC to rely on a decision of the Upper Tribunal that was not readily available to Mr Ahmed or his solicitors. I have therefore not taken that authority into account.

23. It is clear from s 29 TCEA that, subject to the Rules, the Tribunal has "full power to determine by whom and to what extent the costs are to be paid." As HMRC submit it is apparent that the Rules anticipate that applications for costs will be made by, and against, persons who are not a party (or a representative). For example, Rule 10(3) refers to the requirement that "[a] person making an application to the Tribunal" for costs must send the application to "the person against whom it is proposed the order be made". Rules 10(5) and 10(6) introduce the definitions of "paying person" and "receiving person", definitions which are not contingent on being a formal party to the appeal which contrasts with the language used in Rule 10(1)(b) which specifically refers to "a party".

24. Additionally, throughout the Rules the use of "person" is for someone other than a party, eg Rule 5(3)(d) under which the Tribunal may "direct, permit or require a party or another person", Rule 6(4) under which the Tribunal must send a notice to every party "and to any other person affected" by the decision, Rule 6(5) where a "party or other person" wishes to challenge a direction. Similar references to "person" or "persons" can be seen in Rules 7(3), 9, 11, 14(b), 16 and 32.

25. Therefore, given the wide scope of s 29 TCEA which is not limited, at least in relation to costs in complex cases, by the Rules, I consider that the Tribunal does have the power to make an order for costs against a non-party. The question therefore, is whether I should do so in this case.

26. In *Symphony Group Plc v Hodgson* [1994] QB 179 ("*Symphony*") Balcombe LJ observed, at 192-193, that:

> "… the following are material considerations to be taken into account, although I do not suggest that there may not be others which are relevant.

(1) An order for the payment of costs by a non-party will always be exceptional: see *per* Lord Goff in *Aiden Shipping Co. Ltd. v Interbulk* Ltd. [1986] AC 965, 980F. The judge should treat any application for such an order with considerable caution.

(2) It will be even more exceptional for an order for the payment of costs to be made against a non-party, where the applicant has a cause of action against the non-party and could have joined him as a party to the original proceedings. Joinder as a party to the proceedings gives the person concerned all the protection conferred by the rules, as to e.g. the framing of the issues by pleadings; discovery of documents and the opportunity to pay into court or to make a Calderbank offer (*Calderbank v Calderbank* [1976] Fam 93); and the knowledge of what the issues are before giving evidence.

(3) Even if the applicant can provide a good reason for not joining the non-party against whom he has a valid cause of action, he should warn the non-party at the earliest opportunity of the possibility that he may seek to apply for costs against him. At the very least this will give the non-party an opportunity to apply to be joined as a party to the action under Ord. 15, r. 6(2)(*b*)(i) or (ii).

Principles (2) and (3) require no further justification on my part; they are an obvious application of the basic principles of natural justice.

(4) An application for payment of costs by a non-party should normally be determined by the trial judge: see *Bahai v Rashidian* [1985] 1 WLR 1337.

(5) The fact that the trial judge may in the course of his judgment in the action have expressed views on the conduct of the non-party constitutes neither bias nor the appearance of bias. Bias is the antithesis of the proper exercise of a judicial function: see *Bahai v Rashidian* [1985] 1 WLR. 1337, 1342H, 1346F.

(6) The procedure for the determination of costs is a summary procedure, not necessarily subject to all the rules that would apply in an action. Thus, subject to any relevant statutory exceptions, judicial findings are inadmissible as evidence of the facts upon which they were based in proceedings between one of the parties to the original proceedings and a stranger: see *Hollington v F. Hewthorn & Co. Ltd.* [1943] KB 587; *Cross on Evidence*, 7th ed. (1990), pp. 100–101. Yet in the summary procedure for the determination of the liability of a solicitor to pay the costs of an action to which he was not a party, the judge's findings of fact may be admissible: see *Brendon v Spiro* [1938] 1 KB 176, 192, cited with approval by this court in *Bahai v Rashidian* [1985] 1 WLR. 1337 1343D, 1345H. This departure from basic principles can only be justified if the connection of the non-party with the original proceedings was so close that he will not suffer any injustice by allowing this exception to the general rule.

(7) Again, the normal rule is that witnesses in either civil or criminal proceedings enjoy immunity from any form of civil

> action in respect of evidence given during those proceedings. One reason for this immunity is so that witnesses may give their evidence fearlessly: see *Palmer v Durnford Ford* [1992] QB 483, 487. In so far as the evidence of a witness in proceedings may lead to an application for the costs of those proceedings against him or his company, it introduces yet another exception to a valuable general principle.
>
> (8) The fact that an employee, or even a director or the managing director, of a company gives evidence in an action does not normally mean that the company is taking part in that action, in so far as that is an allegation relied upon by the party who applies for an order for costs against a non-party company: see *Gleeson v J Wippell & Co Ltd* [1977] 1 WLR 510, 513.
>
> (9) The judge should be alert to the possibility that an application against a non-party is motivated by resentment of an inability to obtain an effective order for costs against a legally aided litigant. The courts are well aware of the financial difficulties faced by parties who are facing legally aided litigants at first instance, where the opportunity of a claim against the Legal Aid Board under section 18 of the Legal Aid Act 1988 is very limited. Nevertheless the Civil Legal Aid (General) Regulations 1989 (S.I. 1989 No. 339/89), and in particular regulations 67, 69, and 70, lay down conditions designed to ensure that there is no abuse of legal aid by a legally assisted person and these are designed to protect the other party to the litigation as well as the Legal Aid Fund. The court will be very reluctant to infer that solicitors to a legally aided party have failed to discharge their duties under the regulations — see *Orchard v South Eastern Electricity Board* [1987] QB 565 — and in my judgment this principle extends to a reluctance to infer that any maintenance by a non-party has occurred."

27. *Symphony* was applied in *Metalloy Supplies Ltd v MA (UK) Ltd* [1997] 1 WLR 1613 in which Millett LJ (as he then was) said, at 1620:

> "The court has a discretion to make a costs order against a non-party. Such an order is, however, exceptional, since it is rarely appropriate. It may be made in a wide variety of circumstances where the third party is considered to be the real party interested in the outcome of the suit. It may also be made where the third party has been responsible for bringing the proceedings and they have been brought in bad faith or for an ulterior purpose or there is some other conduct on his part which makes it just and reasonable to make the order against him. It is not, however, sufficient to render a director liable for costs that he was a director of the company and caused it to bring or defend proceedings which he funded and which ultimately failed. Where such proceedings are bought bona fide and for the benefit of the company, the company is the real plaintiff. If in such a case an order for costs could be made against a director in the absence of some impropriety or bad faith on his part, the doctrine of the separate liability of the company would be eroded and the principle that such orders should be exceptional would be nullified."

28. In *Dymocks Franchise Systems (NSW) Pty v Todd and others (Associated Industrial Finance Pty Ltd, Third Party)* [2004] 1 WLR 2807 the Privy Council considered the

principles by which the discretion to order costs to be paid by a non-party is to be exercised, stating, at [25]:

> "A number of the decided cases have sought to catalogue the main principles governing the proper exercise of this discretion and their Lordships, rather than undertake an exhaustive further survey of the many relevant cases, would seek to summarise the position as follows. (1) Although costs orders against non-parties are to be regarded as "exceptional", exceptional in this context means no more than outside the ordinary run of cases where parties pursue or defend claims for their own benefit and at their own expense. The ultimate question in any such "exceptional" case is whether in all the circumstances it is just to make the order. It must be recognised that this is inevitably to some extent a fact-specific jurisdiction and that there will often be a number of different considerations in play, some militating in favour of an order, some against. (2) Generally speaking the discretion will not be exercised against "pure funders", described in para 40 of *Hamilton v Al Fayed (No 2)* [2003] QB 1175, 1194 as "those with no personal interest in the litigation, who do not stand to benefit from it, are not funding it as a matter of business, and in no way seek to control its course". In their case the court's usual approach is to give priority to the public interest in the funded party getting access to justice over that of the successful unfunded party recovering his costs and so not having to bear the expense of vindicating his rights. (3) Where, however, the non-party not merely funds the proceedings but substantially also controls or at any rate is to benefit from them, justice will ordinarily require that, if the proceedings fail, he will pay the successful party's costs. The non-party in these cases is not so much facilitating access to justice by the party funded as himself gaining access to justice for his own purposes. He himself is "the real party" to the litigation, a concept repeatedly invoked throughout the jurisprudence-see, for example, the judgments of the High Court of Australia in the *Knight* case 174 CLR 178 and Millett LJ's judgment in *Metalloy Supplies Ltd v MA (UK) Ltd* [1997] 1 WLR 1613. Consistently with this approach, Phillips LJ described the non-party underwriters in *T G A Chapman Ltd v Christopher* [1998] 1 WLR 12, 22 as "the defendants in all but name". Nor, indeed, is it necessary that the non-party be "the only real party" to the litigation in the sense explained in the *Knight* case, provided that he is "a real party in … very important and critical respects": see *Arundel Chiropractic Centre Pty Ltd v Deputy Comr of Taxation* (2001) 179 ALR 406, 414, referred to in the *Kebaro* case [2003] FCAFC 5, at [96], [103] and [111]. Some reflection of this concept of "the real party" is to be found in CPR r 25.13(2)(f) which allows a security for costs order to be made where "the claimant is acting as a nominal claimant". (4) Perhaps the most difficult cases are those in which non-parties fund receivers or liquidators (or, indeed, financially insecure companies generally) in litigation designed to advance the funder's own financial interests. …"

29. HMRC submit that this is an exceptional case where the Tribunal should direct that Mr Ahmed, the director of the Company, should pay the costs of the proceedings that he caused the company to instigate and continue. They contend that as Mr Ahmed has been the sole director and shareholder of the Company since 1 February 2012 he can be considered the controlling mind of the company, and "the real party" to the litigation in the terms described by the Privy Council in *Dymocks*. HMRC refer to the Company's grounds of appeal which must have been approved by Mr Ahmed in the full knowledge that these were not only unsustainable but, given his conviction, false. As such, it is contented that the appeal was

commenced by the Company at the instigation of Mr Ahmed in bad faith, and such conduct falls well outside the "ordinary run of cases". I agree.

30. Like the Company, Mr Ahmed as its sole director would have seen the correspondence from HMRC and the Tribunal and therefore would have had an opportunity to respond to HMRC's costs application and, as with the Company, has chosen to not do so. Also, in the absence of any response to the Tribunal's letters to provide information to the contrary as to his financial position I can only assume that Mr Ahmed does have sufficient means to meet his liabilities.

31. As such, and having regard to the exceptional circumstances of this case, particularly that the Company, on Mr Ahmed's instigation and with his knowledge pursued an appeal on a false basis, I consider the situation in this case to be completely different from that envisaged by Millett LJ in *Metalloy Supplies* of a director bringing bona fide proceedings. Accordingly I consider that it is appropriate to make an order for costs against Mr Ahmed in the form sought by HMRC.

DIRECTION

32. I therefore direct that the Company and its director, Mr Salman Ahmed, be jointly and severally liable to pay HMRC's costs of and incidental to this appeal summarily assessed in the sum of £18,193.60 and for such costs to be paid within 28 days of the date hereof.

RIGHT TO APPLY FOR PERMISSION TO APPEAL

33. 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.

JOHN BROOKS
TRIBUNAL JUDGE

RELEASE DATE: 05 NOVEMBER 2020