# TC08015

*PROCEDURE – application for direction that HMRC answer 15 questions – whether "mirror" of Fairford Directions – held, no – application refused.*

**FIRST-TIER TRIBUNAL** **Appeal number: TC/2017/03643**

**TAX CHAMBER**

**BETWEEN**

**EVERYDAY WHOLESALE LIMITED** **Appellant**

**-and-**

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

**TRIBUNAL: JUDGE ANNE REDSTON**

**The hearing took place on 18 January 2021 by telephone. A face to face hearing was not held because of difficulties caused by the pandemic.**

**Prior notice of the hearing had been published on the gov.uk website, with information about how representatives of the media or members of the public could apply to join the hearing remotely in order to observe the proceedings. The hearing was therefore held in public.**

**Mr Tristan Thornton of TT Tax, on behalf of the Appellant**

**Mr Joshua Carey QC and Mr Lewis McDonald of Counsel, instructed by the General Counsel and Solicitor to HM Revenue and Customs, for the Respondents**

## DECISION

### Introduction and summary

1. The Appellant had been refused a VAT repayment on the basis that it knew or should have known that the transactions in question were connected with the fraudulent evasion of VAT. As part of the preparation for the hearing, the Tribunal issued what have become known as "Fairford directions", following the judgment in HMRC *v Fairford Group plc* [2015] STC 156 ("*Fairford*"), as modified by *Elbrook Cash and Carry Ltd v HMRC* [2019] 4 WLR 117 ("*Elbrook*").

2. The Appellant responded to the Fairford Directions, but followed that response with a list of 15 questions to HMRC ("the Questions"). When HMRC refused to answer the Questions, the Appellant applied to the Tribunal for a direction that HMRC be required to respond ("the Application").

3. The Appellant's position was that:

(1) HMRC's replies would confirm whether or not Mr Thornton, on behalf of the Appellant, had correctly understood HMRC's evidential position;

(2) this in turn would confirm whether the Appellant had complied with the Fairford Directions; and

(3) the Questions were in effect the "mirror" of the Fairford Directions, which required the Appellant to set out its position in advance.

4. HMRC's position was that the Questions were not a mirror of the Fairford Directions, but amounted to seeking HMRC's confirmation that Mr Thornton had correctly understood the evidence already before the Tribunal. Mr Carey said it was up the role of the parties' representatives to assess the evidence, and the Tribunal should refuse to make the directions.

5. I agreed with HMRC and refused the Application.

### The background

6. On 3 April 2017, HMRC refused to repay input tax claimed by the Appellant of £327,888.47 on the basis that the Appellant knew or should have known that the transactions in question were connected with the fraudulent evasion of VAT. On 2 May 2017, the Appellant appealed to the Tribunal against that decision. The amount under appeal was subsequently reduced to £278,232.

7. On 27 July 2017, the parties jointly filed draft directions with the Tribunal. These included a direction that the Appellant should file and serve answers to the following questions:

> "(a) Whether the Appellant accepts the accuracy of each of the transaction chains for which the Respondents have denied input tax as set out in the Respondents' Statement of Case and witness statements ("the Transaction Chains"). If the Appellant does not accept the accuracy of each of the Transaction Chains, the Appellant should specify which of the Transaction Chains it disputes and the reasons why;
>
> (b) Whether the Appellant accepts that there is a tax loss at the start of each of the Transaction Chains. If the Appellant does not accept there is a tax loss at the start of each of the Transaction Chains, the Appellant should specify in

> which of the Transaction Chains it disputes there was a tax loss and the reasons why;
>
> (c) Whether the Appellant accepts the tax loss at the start of each of the Transaction Chains is attributable to the fraudulent evasion of VAT. If the Appellant does not accept that the tax loss at the start of each of the Transaction Chains is attributable to the fraudulent evasion of VAT, the Appellant should specify the reasons why;
>
> (d) Whether the Appellant accepts (without making any admission of knowledge or means of knowledge) that each of the Transaction Chains were part of an orchestrated overall scheme to defraud the revenue. If the Appellant does not accept that each of the Transaction Chains were part of an orchestrated fraud, it should specify the reasons why"

8. The draft directions also required the parties to specify which witnesses each party required for cross-examination.

9. On 8 November 2019, Judge Fairpo gave directions for the progression of the appeal. She included the above questions as Direction 8, and added the following as paragraph (e) to the same Direction:

> "In respect of the Respondents' witness statements which deal only with the issues set out at (a) to (d) above, the passages in those statements which the Appellant does not accept."

10. By Direction 9, Judge Fairpo required the parties to specify which witnesses each party required for cross-examination. It was common ground that Directions 8 and 9 of Judge Fairpo's directions reflected the guidance given in *Fairford* as modified by *Elbrook*. The parties called these "Fairford directions" by way of shorthand, and I have adopted the same terminology. On 22 August 2020, Judge Fairpo's directions were amended by Judge Vos, largely to reflect changes in timescale consequent upon the pandemic.

11. On 1 September 2020, the Appellant filed and served a document in response to Direction 8 ("the Fairford Response"); this was drafted by Mr Thornton. In the Fairford Response, Mr Thornton explained whether the Appellant did or did not accept propositions at (a) to (d) of Direction 8 by reference to the evidence as he understood it, in relation to each of seven suppliers. In relation to most of those suppliers, the Appellant only accepted that it had purchased goods from that supplier. It did not accept the accuracy of the rest of the transaction chains; the existence of a tax loss at the start of the chain; that any such loss was attributable to fraud, or that the fraud was part of an orchestrated scheme.

12. However, in relation to Direction 8(e), the Fairford Response only identified one specific factual disagreement with the witness evidence of an HMRC officer: this was paragraph 26 of Officer Bycroft's statement. At the end of the Fairford Response, Mr Thornton said:

> "Unless set out above the Appellant does not dispute any factual statements contained in any paragraph of the witness statements made by those witnesses whose statements solely related to the points (a) to (d) responded to above…The Appellant has not agreed to the accuracy or truth of the contents of any documents exhibited…"

13. On 7 September 2020, HMRC emailed Mr Thornton, saying "given your response to the Fairford Directions, we will make all Officers available for cross-examination". Mr Thornton replied on 10 September 2020, saying:

> "Aside from any opinion evidence as opposed to evidence of fact (which ought to be ignored by the Tribunal) the Appellant has only set out disagreement with part of Mr Bycroft's evidence. On that basis I would not have expected to need to cross examine the other witnesses which only address those supply chains. If, however, there is any part of what we have set out which you do not agree is what has been set out in the Respondents' evidence then that may change things. To that end, we would need the Respondents to identify which parts of the evidence provided contradicts the Appellant's position set out here so that the Appellant can prepare effectively and the Tribunal's time can be managed."

14. Mr Thornton also said that the Appellant wished to cross-examine Officer Jennison, the Compliance Officer involved in the case. On 11 September 2020 HMRC responded, saying:

> "We confirm that the Tribunal should ignore any opinion evidence adduced by both parties. However, we do not understand what is being suggested in terms of which aspects of the Respondents' evidence contradict the Appellant's evidence. The Respondents' evidence proves the case that they must advance, namely that the Appellant knew or should have known its transactions were connected with fraud. It is for the Appellant to determine whether it disagrees with any matters of fact that it wishes to cross-examine about, although we do not require you to set out which paragraphs or what those concerns are. We are content that you have identified a factual dispute with Officer Bycroft's evidence and we will ensure that he is called as a witness for cross-examination."

15. Mr Thornton replied by return. He began by saying that "in our response the Appellant has set out its understanding of the evidence submitted by the Respondents" and that HMRC's evidence did not trace all the supply chains through to the defaulter. He then set out his concerns; these are reflected in his submissions about the Application and are considered below.

16. On 15 September 2020 Mr Thornton sent HMRC the Questions subsequently contained in the Application, and on the same day, HMRC declined to respond the Questions. On 19 September 2020, Mr Thornton made the Application on behalf of the Appellants.

**The Questions in the Application**

17. The Questions are set out in full below. In this decision, I have referred to individual Questions with the prefix Q, so that for example Q1 is Question 1.

(1) Do the Respondents accept that aside from period 10/15 the Respondents have no information as to the supply chain beyond Phoenix Wholesalers?

(2) Do the Respondents accept that the assessments issued to Phoenix Wholesalers to which the Appellant's transactions relate were withdrawn?

(3) Do the Respondents accept that in relation to period 04/16 the Respondents have no information as to the supply chain beyond Gempost?

(4) Do the Respondents accept that in relation to period 04/16 the Respondents have not issued an assessment to Gempost for VAT considered due on supplies to the Appellant?

(5) Do the Respondents accept that in relation to period 10/14 the Respondents have no information as to the supply chain beyond the Appellant having bought from Gempost who bought from IK Drinks?

(6) Do the Respondents accept that the Respondents have no information as to the supply chain beyond Infinity Collections?

(7) Do the Respondents accept that the assessment issued to Infinity Collections and detailed in exhibit JB4 does not include the relevant supply to the Appellant?

(8) Do the Respondents accept that the Respondents have no information as to the supply chain beyond the Appellant having bought goods from Booze Factory who bought goods from Pachinger Bros?

(9) Do the Respondents accept that only two assessments are included in exhibit TJ46 as referred to at §71 of the witness statement of Tony Jennison? (please note the reference at 4(b) was wrong and should have read §71)

(10) Do the Respondents accept that reference to the debt to HMRC of £257k at §15.2 of the third witness statement of Tony Jennison is not intended to be evidence of the fraudulent loss of VAT to which the Appellant's transactions were connected?

(11) Do the Respondents accept that there are no invoices contained within exhibit TJ56 or elsewhere that are asserted to be traced to invoice 2261 contained in exhibit TJ55?

(12) Do the Respondents accept that no breakdown has been provided for the assessments contained within exhibit TJ66?

(13) Do the Respondents accept that in relation to period 04/15 they have no information as to the supply chain beyond IK Drinks?

(14) Do the Respondents accept that they raised no assessments in relation to the VAT from invoices issues after the date of deregistration of IK Drinks?

(15) To the extent (if any) that the Respondents do not accept any of the above, please explain why.

18. During the hearing, Mr Carey accepted that Officer Jennison's witness statement had erroneously attached only two of the three assessments which were under challenge, and so answered Q9. I have therefore taken it that the Appellant was no longer asking the Tribunal to direct that HMRC respond to that Question.

**Mr Thornton's submissions on behalf of the Appellant**

19. I have grouped Mr Thornton's main submissions under three headings: whether the Questions mirrored the Fairford Directions; the need for a cards on the table approach, and the observations of Chief Master Marsh in *Glaxo Wellcome UK Ltd* v *Sandoz Ltd* [2018] EWHC 1626 (Ch) ("*Glaxo*").

*Questions mirror Fairford*

20. The Application said:

> "The Appellant considers that this application reflects the same form of advance disclosure and effort considered by the Upper Tribunal at §51 and §53 of *Elbrook Cash & Carry*. It is no less inappropriate to require the Respondents to set out their position in advance than it was to require the Appellants to set out theirs."

21. In relation to Q15, which asked HMRC to explain their reasons if they disagreed with any of the statements made in Q1 to Q14, the Application said:

> "This requirement is an exact mirror of the requirement on the Appellant under the Fairford direction. To take question 1 as an example, if the Respondents do not accept that they have no information as to the supply chain beyond Phoenix Wholesalers, it is reasonable for them to point to that evidence if it has been produced. Insofar as this confirms gaps in the physical evidence served on the Appellant or answers points of ambiguity in the evidence this will serve to narrow the issues and streamline the final hearing. This is the purpose and principle of the *Fairford* directions."

*Cards on the table*

22. Mr Thornton said that the Fairford Response set out his understanding of HMRC's evidence, including where in his view there were gaps in the matters on which HMRC would be put to proof. He said "the Appellant has set out its views in advance and asked the Respondents to confirm or deny them". He submitted that it was important for HMRC to confirm whether he had correctly understood the evidence, and that this reflected the "cards on the table" approach to modern litigation to which the Upper Tribunal had referred in *Elbrook*. He added "if those cards are placed on a table 10 feet away and are hard to read, this benefit is lost". In his skeleton argument he said:

> "Unless the Appellant has been able to properly understand the relevant passages in the witness statement, or the evidence taken as a whole, the Appellant cannot effectively fulfil its obligation under directions 8 and 9. In circumstances where there is good reason to believe the Respondents consider that the Appellant has not properly understood the Respondents evidence, the purpose of the initial exercise has been thwarted. It is reasonable for the Tribunal to issue additional directions to increase clarity and narrow the scope of cross examination required."

23. As set out at Direction 8(e), the Fairford Directions concern the witness statements of those officers who give evidence about particular transaction chains. Mr Thornton said during the hearing that he was concerned lest evidence exhibited to the witness statement of one of those officers was relied on by HMRC in the course of submissions in relation to a different transaction chain. He submitted that if he was aware of this before the hearing, he could decide whether or not to ask that witness to attend for cross-examination.

24. Mr Thornton also said his concerns had increased as the result of HMRC refusing to answer the Questions. In his words:

> "The Appellant had considered its reading of the evidence to have been uncontroversial. However, the Respondents' refusal to provide simple yes or no confirmations, especially in relation to the completeness of the exhibits served has caused the Appellant concern. The Appellant now has reason to believe that the Respondents intend to assert their evidence establishes very different factual premises to that which appear from the face of the evidence."

*Reliance on Glaxo*

25. Mr Thornton also relied on *Glaxo,* where the claimants had served a notice on the defendants under Civil Procedure Rule ("CPR") 32.18. This Rule provides that "a party may serve notice on another party requiring him to admit the facts, or the part of the case of the serving party, specified in the notice".

26. In *Glaxo.* the defendant had refused to admit the facts set out in the notice. Chief Master Marsh said at [20] that:

> "the objective that lies behind the notice to admit facts is an entirely laudable one. There are, undoubtedly, many matters of fact in this case which are not controversial and it will be helpful to get into the open precisely what those facts are."

27. In the following paragraph Chief Master Marsh said that the Court had the discretion to "to make the sort of order that the claimants seek applying the overriding objective and [its] broad case management powers", but given the particular circumstances of that case he declined to do so.

28. In Mr Thornton's submission, the Tribunal had a similar discretion, and it was in the interests of justice for that discretion to be exercised in favour of the Appellant, given that the facts of which he was seeking confirmation were not controversial.

*Points no longer maintained*

29. In his skeleton, Mr Thornton said that if the Tribunal did not grant the Application:

> "the Appellant must be allowed access to each of the witnesses to be able to put its case to them and have them confirm its view; or to challenge any alternative view which does not appear to be supported by their evidence."

30. However, he accepted during the hearing that it is not the role of a party's representative to put his client's case to a witness, nor is it the role of a witneses to confirm (or otherwise) either party's case.

31. In his earlier correspondence with HMRC, Mr Thornton expressed concerns that HMRC might "provide additional evidence" at or shortly before the hearing of the appeal, and if this occurred it would constitute "ambush litigation" which would be "likely to lead to a significant portion of the start of the hearing being devoted to submissions as to whether or not additional evidence will be permitted". However, he clarified during the proceedings that he was no longer concerned with that possibility. Instead, he accepted that if HMRC did seek to rely on evidence not yet filed and served, they would need the permission of the Tribunal, and that the Appellant would be able to object.

**Mr Carey's submissions on behalf of HMRC**

32. Mr Carey submitted that the Application was "wrong in principle" because by the Questions the Appellant was seeking to "extract a concession [from HMRC] on the conclusions to be drawn from the evidence in advance of trial". It was, instead, the job of the party's representative to consider the evidence and identify whether there are links or gaps in that evidence, and then to make appropriate submissions at trial. Mr Thornton was seeking an "insurance policy" from HMRC that he had not overlooked any linking or connecting evidence which might assist HMRC to make their case. If the Tribunal allowed the Application and made the direction, the Appellant would be insulated from that risk, and HMRC's freedom to draw the Tribunal's attention to patterns and connections in the evidence would be "hobbled".

33. Mr Carey said that the Application was "entirely novel", noting that Mr Thornton had not cited any case where a Tribunal had given such a direction. In particular, there was no parallel with *Fairford* or *Elbrook,* which had simply sought to "ensure that only witnesses

who give evidence that is genuinely disputed attend trial, avoiding unnecessarily lengthy hearings and delays".

34. Mr Carey also submitted that the Appellant's reliance on *Glaxo* was also misplaced. Chief Master Marsh had described a notice to admit facts as "a convenient procedural device [which] has the potential to save cost because a party need not go to the expense of proving uncontroversial detail". In contrast, the Questions were not dealing with "uncontroversial detail" but instead the heart of the dispute: the transaction chains which, in HMRC's submission, trace back to fraudulent defaulters.

35. Although there is no equivalent to CPR 32.18 in the Tribunal, Mr Carey accepted that the Tribunal had a similarly broad discretion and had the power to direct that one or both parties set out agreed facts, but in his submission it was clearly not in the interests of justice to make such a direction by allowing the Application.

**Discussion and decision**

36. I have considered each of Mr Thornton's main points in the same order as they were set out earlier in this decision.

*Questions a mirror of Fairford?*

37. I do not accept Mr Thornton's submission that the Application mirrored the Fairford Directions. Those directions require an appellant to review *HMRC's* evidence and set out what it does and does not accept. By the Application, the Appellant is asking HMRC to review *their own evidence*, and say whether or not Mr Thornton has correctly understood that evidence. This is entirely different in nature from the Fairford Directions.

38. The purpose of the Fairford Directions was explained by the Upper Tribunal ("UT") in *Elbrook* at [52]:

> "The principal objective of the directions is to enable the full hearing to be listed for an appropriate length of time given the number and identity of the witnesses that need to be called to give evidence. If there are, say, ten witnesses called by HMRC dealing only with the VAT Loss Issues and the appellant wishes to leave open until the final hearing the possibility of cross-examining each of them, then it is necessary to list the hearing both (1) for the length of time necessary to allow for that cross- examination and (2) on dates (at least potentially) that take into account their availability. If the appellant decides at or just before the hearing that it is unnecessary to cross-examine any of them, or only some of them, or on only very limited parts of their statements, then this risks wasting the time of the parties and the tribunal, leading to the possibility of void days in the hearing if witnesses scheduled to be heard later, under the original timetable, are unavailable on any earlier date."

39. The purpose of Fairford Directions is therefore not to force the Appellant to make an "advance disclosure" of its substantive position, as Mr Thornton asserted was the case but instead ensure that a hearing is set down for an appropriate length of time, taking into account the identity and number of the witnesses whose evidence is contested and who are therefore required to attend the hearing. As the UT said at [57] of *Elbrook*, they are "a tool of efficient case management".

*Cards on the table?*

40. As Mr Thornton said, *Elbrook* also referred to the need for a "cards on the table" approach. The UT cited with approval a paragraph from *Booth v HMRC* [2016] UKFTT 261 (TC), a decision of Judge Berner, in which he said:

> "The modern approach to case management is, as is well-established, one of 'cards face up on the table', but that does not mean that a party should be obliged to disclose in advance its line of questioning in cross-examination. It is enough…that the appellant identify the respects in which the relevant witness statements are disputed or, I would say, not accepted. There is no necessity for an appellant to go further than that."

41. Just as the "cards face up on the table" does not require a party to disclose his cross-examination strategy in advance of the hearing, it also does not require a party to confirm whether the other party has correctly understood the evidence. Once the parties have set out their evidence "face up" on the table, it is for their representatives to assess that evidence and explain how it supports the case they are making.

*Glaxo*

42. It is true that if two parties to a hearing can agree a statement of facts, that may, as Mr Thornton submitted, "narrow the issues and streamline the final hearing", and it is also true that the Tribunal has the discretion to direct that the parties agree a statement of facts. But as Chief Master Marsh says in *Glaxo*, this is the position for uncontroversial facts, not those central to the dispute between the parties, such as the components of the transaction chains in an MTIC appeal. I decline to exercise my discretion to make such an order in this case.

*Other submissions*

43. Mr Thornton also said that "the Appellant now has reason to believe that the Respondents intend to assert their evidence establishes very different factual premises to that which appear from the face of the evidence" and that the Tribunal should allow the Application because there were "circumstances where there is good reason to believe the Respondents consider that the Appellant has not properly understood the Respondents evidence". However, he provided no support for either submission, other than HMRC's refusal to answer the Questions, and I accept Mr Carey's explanations as to the reasons for that refusal.

44. I also do not accept Mr Thornton's submission that the purpose of the Fairford Directions has been "thwarted" unless HMRC reply to the Questions. It is clear from the Fairford Response that the Appellant is putting HMRC to proof on almost all of the elements of their case, and HMRC will therefore need to take that into account in their submissions before the Tribunal.

**Decision**

45. For the reasons set out above, I dismiss the Application, and issue the directions set out below.

**Directions**

46. By 23 February 2021 the Appellant is to inform HMRC whether, as previously notified, the only witnesses whose evidence is in dispute are Officer Bycroft and Officer Jennison, or in the alternative, to inform HMRC of the passages which it does not accept in the statements

of those other HMRC witnesses who deal only with the issues of the existence of a fraudulent tax loss and connection to transactions entered into by the Appellant.

47. In the case of any witness statement from a HMRC witness in respect of which the Appellant has not, by the date set out above, identified any passages which it does not accept, that statement shall stand as the evidence of the witness and the witness shall not be required to attend the hearing to be cross-examined on that statement.

48. By 16 February 2021 the parties are to comply with Direction 9 of Judge Fairpo's directions, as amended by Judge Vos.

**Right to apply for permission to appeal**

49. 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.

50. 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.

**ANNE REDSTON**

**TRIBUNAL JUDGE**

**RELEASE DATE: 2 FEBRUARY 2021**