



*PROCEDURE – application for sist – criminal proceedings - refused*

**FIRST-TIER TRIBUNAL**

**TAX CHAMBER**

**TC07100**

**Appeal number: TC/2017/04646 (now  
Consolidating appeals TC/2018/06162,  
TC/2018/06512 and TC/2019/01134)**

**BETWEEN**

**MOHAMMAD AMEEN MIRZA**

**Appellant**

**-and-**

**THE COMMISSIONERS FOR**

**HER MAJESTY’S REVENUE AND CUSTOMS**

**Respondents**

**TRIBUNAL: JUDGE ANNE SCOTT**

**Sitting in public at George House, Edinburgh on Monday 8 April 2019**

I heard Mr T Nawaz for the Appellant and Mrs A Sinclair and Mrs C Cunliffe, Officers of HMRC, for the Respondents.

## DECISION

### INTRODUCTION

#### Procedural matters

*Appeals TC/2018/0616, TC/2018/06512 and TC/2019/01134*

1. The parties were agreed that these appeals be consolidated with TC/2017/04646. Therefore there is now only one appeal and that under reference TC/2017/04646.

#### Summary of the findings of fact and reasons for the Decision

##### HMRC's application

2. HMRC has lodged an application to sist the consolidated appeal TC/2017/04646 "until further notice". That is vigorously opposed by the appellant.

##### The Facts

3. The Facts are not in dispute. On 22 October 2015, the appellant was arrested and charged with the fraudulent evasion of Value Added Tax (VAT) contrary to Section 72 of the Value Added Tax Act 1994 ("VATA"). Significant publicity in the media followed.

4. A Standard Prosecution Report ("SPR") was submitted to the Crown Office and Procurator Fiscal Service ("COPFS") on 31 August 2016. At the request of COPFS a Supplementary Report was submitted on 17 April 2017 followed by a further Supplementary Report on 28 February 2018.

5. At the last hearing in this matter on 16 January 2019, the appellant acceded to a request that the appeals other than TC/2019/01134 be sisted until 31 January 2019. That was on the basis that his Counsel had been informed that COPFS would be in a position to decide whether or not the appellant should be prosecuted within a matter of two weeks. COPFS was apparently awaiting receipt of better copies of some documentation from HMRC before making that decision. Judge Thomas refused HMRC's application for a sist for a period of three months pointing out, correctly, that HMRC were at liberty to lodge a further application, if so minded. They did.

6. As at the date of this hearing no final decision has been made as to whether or not a criminal case will progress and it is not clear what reason(s) there might be for this further delay.

##### HMRC's argument

7. HMRC allege that if the appeal proceeds

"Some facts and circumstances may be disclosed which might prejudice either the prosecution or the defence at any subsequent trial with the result that the criminal proceedings may not ensue".

They therefore request that the appeal be sisted until further notice which failing a sist for a period of a further six months should be granted.

8. HMRC rely on *Banaghan v HMA*<sup>1</sup> for the proposition that admissions made in evidence given in other cases can be led as evidence in other civil and criminal cases. In general, that is correct if evidence has been given under oath.

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<sup>1</sup> 1888 15 R (J) 39

## The appellant's arguments

9. The appellant relies on Article 6 of the European Convention on Human Rights and, in particular, the following:-

“In the determination of the civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial Tribunal established by law ...”.

10. The appellant alleged that there is no apparent direct legal authority for such a stay to be granted but relies on *Bittar & Others v FCA*<sup>2</sup> (“Bittar”). That is not a tax case and deals with regulatory proceedings.

## Discussion

11. In fact there are a number of decisions on the question as to whether FTT proceedings should be stayed (or stayed) pending criminal proceedings and an example of one such is *Dong and Fang v NCA*<sup>3</sup> (“Fang”).

12. I agree with Judge Mosedale in *Fang* where she stated that whether or not the appeal should be stayed turned on the question as to whether there was “a real risk of prejudice...in the criminal proceedings” and for that she relied on paragraph 31 of *Mote v SSWP*<sup>4</sup> which reads:

“31. I do not accept that the Human Rights Act 1998 requires any material change of approach in this area. In my judgment the court still enjoys a real discretion whether or not to adjourn. The authorities make clear that a relevant consideration is whether the continuation of the civil proceedings will give rise to a real risk of prejudice to the defendant in the criminal proceedings. If there is a risk of prejudice, then I would expect it to weigh heavily in favour of an adjournment pending the conclusion of the criminal proceedings, but it will not necessarily be decisive. I accept, of course, that the court must not act in breach of the defendant's Convention rights; but it is difficult to see how the continuation of the civil proceedings could give rise in itself to a breach of those rights. As the tribunal chairman held in the present case, the civil proceedings can be conducted in such a way as to respect them. An additional and important safeguard lies in the powers of the judge in the criminal proceedings to stay those proceedings for abuse of process or to limit the evidence admitted at the trial if, in the circumstances then prevailing, it is necessary to do so in order to prevent a breach of Convention rights or to ensure a fair trial. The civil court or tribunal can take into account the existence of those powers when considering the exercise of its own discretion whether to adjourn.

13. *Banaghan* is of very limited assistance since it is merely authority for the proposition that evidence in a civil case is not incompetent *per se* in a criminal case or *vice versa*.

14. The appellant produced the decision in *Bittar* and a commentary thereon which highlighted Judge Herrington's statement that:

“There is a strong presumption against a stay and it is a power which has to be exercised with great care and only where there is a real risk of serious prejudice which may lead to injustice.”

15. Whilst he certainly did say that at paragraph 16, he made a number of other very pertinent points, with all of which I agree. Those are:-

(a) At paragraph 11 he stated that the Tribunal should be guided by the Overriding objective (and I annex a copy thereof at Appendix 1) and the need to balance the competing interests of the parties.

(b) He went on to state that “It is unusual for the subject of criminal proceedings not to wish to stay parallel civil proceedings ...”. That is the case in this instance.

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<sup>2</sup> 2016 UKUT 265 (TCC)

<sup>3</sup> 2016 UKFTT 116 (TC)

<sup>4</sup> [2007] EWCA Civ 1324

- (c) The burden of proof lies with the party who seeks the sist and therefore, in this case, HMRC must demonstrate that it is in the interests of justice to grant the sist.
- (d) The Tribunal must avoid delay so far as compatible with proper consideration of the issues.
- (e) There will be a real risk of prejudice to the right to a fair trial where civil proceedings are heard shortly before the criminal proceedings as the result of any publicity relating to the civil proceedings being fresh in the minds of the jury or any witnesses.
- (f) The exercise of Case Management powers in civil proceedings or indeed criminal proceedings is capable of addressing a potential serious risk of injustice.
16. The decision as to whether or not to grant the Application, like other Case Management decisions, is an exercise of judicial discretion. The principles applicable thereto should be well known and are effectively a balancing exercise.
17. As is made clear in *Transport for London v O’Cathail*<sup>5</sup> at paragraph 42:  
“It is appropriate that the overarching fairness factor should be taken into account in assessing the effect of the decision on the application on both sides”.
18. *Dhillon v Asiedu*<sup>6</sup> at paragraph 30 confirms that Case Management decisions are a balancing exercise which must take into account all relevant factors. Both parties are entitled to have a case dealt with fairly and justly. The exercise of judicial discretion must be in accord with the Overriding objective.
19. There are a number of issues in this matter but key amongst them is that whilst the Tribunal and the parties can identify the subject matter and the period to which it relates in the civil proceedings, there is a total lack of clarity as to whether there will be criminal proceedings, if so in what forum, relating to what and the timescale for those proceedings.
20. I agree with Judge Mosedale at paragraph 10 of *Fang* that:  
“It is not enough to show that there may be some factual areas of overlap, or that the appellant could be cross examined twice (once in the civil and once in the criminal courts) on the same matter. It must be shown it would prejudice the criminal trial and it could only do that if evidence arising in or findings from the civil case were used against the defendant by the prosecution or known to the jury. I do not see that it matters if it is merely known to the prosecution if they cannot use it in the trial.”
21. All that is being alleged by HMRC is a hypothetical risk of prejudice and there is no evidence beyond what amounts to a simple averment. That is not evidence of serious risk.
22. By contrast, the appellant alleges that he is exposed to serious prejudice because it is his case that he will win some part or all of these civil proceedings and in that event HMRC would owe him large sums of money. The lack of those funds is putting huge pressure on his working capital and therefore causing potential problems with accessing funds.
23. His primary issue is that he has the right to have these proceedings determined within a reasonable time and, although he has been reasonable thus far in acceding to HMRC’s requests for sist, he now needs to have a degree of certainty.
24. Although the appeal is not particularly “stale” I have no hesitation in finding that the lack of action on the part of the COPFS and the complete absence of anything that is recognisable as a timescale for litigation, or not, means that the application for sist is not granted at this juncture. It is not in the interests of justice.

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<sup>5</sup> 2013 EWCA Civ 21

<sup>6</sup> 2012 EWCA Civ 1020

### **Decision on the Application**

25. The Application for sist is refused both until further notice and for six months. If the factual matrix changes then either party is at liberty then to apply for a sist, if so wished.

#### **RIGHT TO APPLY FOR PERMISSION TO APPEAL**

26. 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.

**ANNE SCOTT  
TRIBUNAL JUDGE**

**RELEASE DATE: 15 APRIL 2019**