[2019] UKFTT 348 (TC)

TC07176

APPLICATION TO STRIKE OUT APPEAL– case that card handling fees are exempt has no reasonable prospect of success in light of CJEU's decision in Bookit *– case that assessments out of time allowed to proceed but only on basis its that its case (both legal and factual) that HMRC acted unreasonably in not making a different assessment earlier was not shown to be not fit for trial – application allowed in part*

FIRST-TIER TRIBUNAL
TAX CHAMBER

Appeal number: TC/2018/2006, 2194 and 4106

BETWEEN

TICKET ARENA LIMITED **Appellant**

-and-

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

TRIBUNAL: JUDGE BARBARA MOSEDALE

Sitting in public at Taylor House, Rosebery Avenue, London on 26 March 2019

Mr M Paulin, Counsel, for the Appellant

Ms N Barnes, Counsel, instructed by the General Counsel and Solicitor to HM Revenue and Customs, for the Respondents

DECISION

INTRODUCTION

1. The appellant, referred to in this decision notice as TAL, has lodged three appeals with this Tribunal. HMRC had applied to strike out all of them, and this was the hearing of that application.

2. TAL VAT registered from 1 June 2013, although it had commenced trading in 2011. Its first VAT period covered 4 months to 09/13. I note, although it does not impact on the appeal, that from 1 February 2016, TAL was re-registered under a different VAT number as representative member of a VAT group.

3. On 20 September 2017, HMRC assessed it to VAT allegedly underpaid in 09/13, and then on 7 December 2017, HMRC assessed it to VAT allegedly underpaid in periods 12/13 to 1/16. TAL appealed these assessments by appeal reference number TC/18/2006.

4. In late 2017, HMRC assessed TAL to VAT allegedly underpaid in its VAT periods for 2016. TAL appealed those assessments by appeal reference number TC/18/2194. These assessments were made on TAL under its new VAT number.

5. Then, on 8 June 2018, HMRC amended TAL's date of original VAT registration back to 1 May 2011. TAL appealed that decision by appeal reference number TC/18/4106.

6. I note, for the sake of completeness, that HMRC later amended the assessments for two periods in 2014 increasing them by £10,381 in total. I was told that these additional assessments simply reflected a recalculation of the appellant's alleged liabilities. The appellant has recently lodged appeals against these additional assessments, but the application on the grounds of hardship for relief from payment of the tax pending resolution of the appeal was outstanding until just before the hearing of this strike out application, and so this fourth appeal did not form part of today's hearing.

7. The appellant's case was that the assessments under its original VAT number were all out of time and that, in any event, certain of its supplies were exempt from VAT with the effect it was only registerable from June 2013 and, contrary to HMRC's opinion, it had calculated and declared the correct amount of VAT.

8. HMRC's position was that the appeals should all be struck out because neither its case that the assessments were late nor its case that the supplies in issue were exempt had a reasonable prospect of success.

THE TRIBUNAL'S EXERCISE OF DISCRETION

9. The parties were almost entirely agreed on the law applicable to HMRC's strike out application and I set this out.

10. The Tribunal's rules give this Tribunal a discretion to strike out an appeal where it is satisfied that the appeal has no reasonable prospect of success. The Upper Tribunal in *Fairford* [2014] UKUT 329 (TCC) at [30] ruled that this Tribunal ought to have regard to the authorities under the CPR on whether it was appropriate to exercise the discretion to strike out an appeal for having no reasonable prospect of success. At [41] the Upper Tribunal said:

> In our judgment an application to strike out in the FTT under Rule 8(3)(c) should be considered in a similar way to an application under CPR 3.4 in civil proceedings … The Tribunal must consider whether there is a realistic, as opposed to a fanciful (in the sense of it being entirely without substance) prospect of succeeding on the issue at a full hearing, see *Swain v Hillman* [2001] 2 All ER 91 and *Three Rivers* …Lord Hope at [95]. A 'realistic' prospect of success is one that carries some degree of conviction and not one

> that is merely arguable, see *ED & F Man Liquid Products v Patel* [2003] EWCA Civ 472. The tribunal must avoid conducting a 'mini-trial'. As Lord Hope observed in *Three Rivers*, the strike out procedure is to deal with cases that are not fit for a full hearing at all.

11. I was also referred to the Court of Appeal decision in *S v Gloucestershire County Council* [2001] Fam 313 where May LJ said at 342, in summary, that the court might be satisfied that a party's factual case had no reasonable prospect of success but could only be so satisfied where it had the main evidence before it and the assessment of that evidence was unlikely to be affected by cross-examination:

> "… in cases of this kind, the court will only strike out a statement of case under CPR r 3.4(2)(a) in the clearest case. … There is no longer an embargo on the court considering evidence, but the application relates centrally to the statement of case. … the court will first need to be satisfied that all substantial facts relevant to the allegations of negligence, which are reasonably capable of being before the court, are before the court; that these facts are undisputed or that there is no real prospect of successfully disputing them; and that there is no real prospect of oral evidence affecting the court's assessment of the facts. There may be cases where there are gaps in the evidence but where the court concludes, for instance from the passage of time, that there is no real prospect of the gaps being filled. … Secondly, the court will need to be satisfied that, upon these facts, there is no real prospect of the claim …succeeding and that there is no other reason why the case should be disposed of at a trial. If by this process the court does so conclude … there will, in my view, have been proper judicial scrutiny of the detailed facts of the particular case such as to constitute a fair hearing in accordance with art 6 of the Convention."

12. I was also referred to the Court of Appeal in *TFL Management Services Ltd v Lloyds Bank Plc* [2013] EWCA civ 1415 at [26] where the Court said much the same thing and in particular approved the statement that the court had to take into account 'the evidence that can reasonably be expected to be available at trial'.

13. With regards to the test for the party's legal case, I was referred to *Arcadia* [2014] EWHC 3561 where Simon J said at [19] that:

> Some disputes on the law or construction of a document are suitable for summary determination, since (if it is bad in law) the sooner it is determined the better…On the other hand, ..it may not be appropriate to decide difficult questions of law on an interlocutory application where the facts may determine how those legal issues will present themselves for determination and/or the legal issues are in an area that requires detailed argument and mature consideration…

14. In summary, what I take from the authorities is that HMRC have to satisfy me, without me having to conduct a mini-trial, that the appellant's case has no reasonable prospect of success, and I should be wary of reaching that conclusion (or at least of exercising my discretion against the appellant) where the appellant's full factual case may not yet be known, or the legal case is complex.

15. With these principles in mind, I turn to the factual and legal case to be put by the appellant.

DOES THE APPELLANT'S CASE ON TIME LIMITS HAVE A REASONABLE PROSPECT OF SUCCESS?

16. The parties addressed the time-limit ground of appeal first and so I will do so as well. The applicable time-limit is that set out in s 73(6) and is as follows:

> (6) An assessment under subsection (1)…above of an amount of VAT due for any prescribed accounting period must be made within the time limits provided for in s 77 and shall not be made after the later of the following –
>
> (a) 2 years after the end of the prescribed accounting period; or
>
> (b) one year after evidence of facts, sufficient in the opinion of the Commissioners to justify the making of the assessment, comes to their knowledge,
>
> …..

S 77 gave a long-stop time limit of four years from the end of the prescribed accounting period concerned.

17. The second appeal (TC/18/2194) concerned VAT periods falling in 2016: the assessment was made in late 2017 and so it was clearly within time under s 73(6)(a) and s 77(1). The appellant does not suggest these assessments were out of time. The appeal TC/18/2194 could only have a reasonable prospect of success if it had another ground of appeal, and it did. That was the claim the supplies assessed were exempt and I consider that in the next section.

18. The other assessments (TC/18/2006) related to VAT periods falling in 2013-2015 and the assessments were made on 27 September 2017 (for 09/13) and on 22 December 2017 (for the rest). They were therefore out of time under s 73(6)(a) and so the question was whether they were timely under s 73(6)(b) and s 77(1).

19. So far as the long-stop time limit in s 77 was concerned, all the assessments were clearly within 4 years of the assessed accounting period with the exception of the revised assessment for the first assessed period of 9/13. That does not appear to matter as the revision was to reduce the assessment which was within the 4 year time period.

20. The remaining question for all TC/18/2006 assessments was whether they were in-time under s 73(6)(b) which required them to be made within 'one year after evidence of facts, sufficient in the opinion of the Commissioners to justify the making of the assessment' coming to HMRC's knowledge.

The appellant's legal case on 'sufficient evidence of facts'

21. I was referred to *Pegasus Birds Ltd* [1998] EWHC 1096 where Dyson J summarised the principles applicable to s 73(6)(b) as follows:

> 1. The Commissioners' opinion referred to in section 73(6)(b) is an opinion as to whether they have evidence of facts sufficient to justify making the assessment. Evidence is the means by which the facts are proved.
>
> 2. The evidence in question must be sufficient to justify the making of the assessment in question: C & E Commissioners v Post Office [1995] STC 749, 754G.
>
> 3. The knowledge referred to in section 73(6)(b) is actual, and not constructive knowledge: C & E Commissioners v Post Office at p755D. In this context, I understand constructive knowledge to mean knowledge of evidence which the Commissioners do not in fact have, but which they could and would have if they had taken the necessary steps to acquire it.
>
> 4. The correct approach for a Tribunal to adopt is (i) to decide what were the facts which, in the opinion of the officer making the assessment on behalf of the Commissioners, justified the making of the assessment, and (ii) to determine when the last piece of evidence of these facts of sufficient weight to justify making the assessment was communicated to the Commissioners. The period of one year runs from the date in (ii): ….

> 5. An officer's decision that the evidence of which he has knowledge is insufficient to justify making an assessment, and accordingly, his failure to make an earlier assessment, can only be challenged on Wednesbury principles, or principles analogous to Wednesbury: ….
>
> 6. The burden is on the taxpayer to show that the assessment was made outside the time limit specified in section 73(6)(b) of VATA.

22. Later case law has elucidated the *Pegasus Birds* test. It seems clear that the question at (2) is when sufficient evidence of facts to make the particular assessment which was made comes to HMRC's attention. This is apparent from what was said by Potts J in *Post Office v HMRC* [1995] STC 749:

> …. The question for the tribunal was not, 'when the error in the computations should have been found' by Customs officers, but when 'evidence of facts sufficient in the opinion of the Commissioners to justify the making of the assessment' came to their knowledge. Paragraph 4(5)(b) does not, in my opinion, encompass constructive knowledge.

23. This test, which I shall refer to as the 'actual assessment test' has been applied in a number of FTT decisions, including the following:

> [54],,,, we start with the assessments which HMRC have actually made, not with assessments that they could have made ….
>
> [55] When the legal test is viewed in this way the answer in our view is clear. The evidence of facts sufficient [in HMRC's] view to justify making the actual assessments was the actual figures supplied period by period immediately before the assessments were made. This being the position, clearly the assessments were all made in time. [HMRC's] view that the receipt of the actual figures justified the making of the actual assessments which reflected them was not challenged by [the appellant] on the basis that it was Wednesbury unreasonable, and, in any case, no such challenge could have succeeded.
>
> [56] Mr. Sinfield's arguments based on the fact that HMRC did not make assessments based on the estimated figures before such assessments would have been out of time do not in our view provide any reason for impugning the validity of the assessments actually made. Nor is Miss Gardner's motive in asking for the exact figures relevant to the question we have to decide. What is relevant is whether Miss Gardner was of the opinion that the receipt of the exact figures justified the making of the assessments which were actually made, and we find that she was of that opinion.
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> *Weight Watchers (UK) Ltd* [2010] UKFTT 384 (TC)
>
> [22] It is also clear, and this was common ground, that the focus of the tribunal's enquiry is on the assessment that the officer actually made, not one that could have been made. …. Thus, although it would have been possible for the officer in this case to have made a series of assessments, an earlier one in respect of trades with counterparties where she was of the view that she had all the necessary information to make such an assessment and a later one when in relation to trades with other counterparties she received the further information which in her opinion justified an assessment in respect of those transactions, that is not relevant. The tribunal must focus on the assessment that was actually made.
>
> *Carbondesk* [2015] UKFTT 367 (TC)

> [17] It is also well established (*Post Office,* at 754) that the evidence of facts must be sufficient to justify the assessment that was actually made: an assessment is not out of time simply because a different assessment could have been made on what was known to HMRC more than one year before the actual assessment was made.
>
> *Royal Bank of Scotland* [2017] UKFTT 223 (TC)

24. Moreover, the Upper Tribunal took this as read in the case of *ERF* [2012] UKUT 103: [30]. However, what the Upper Tribunal considered in that case was the meaning of Dyson J's paragraph (5) in *Pegasus.* And that is what I now turn to.

25. While *Pegasus* gave clear guidance that the question whether the assessment was made 'one year after evidence of facts, sufficient in the opinion of the Commissioners to justify the making of the assessment' was referring to the actual assessment made, what Dyson J meant by paragraph (5) is more debatable. He said:

> An officer's decision that the evidence of which he has knowledge is insufficient to justify making an assessment, and accordingly, his failure to make an earlier assessment, can only be challenged on Wednesbury principles, or principles analogous to Wednesbury: ….

26. By this he could have meant one of two things. Either he meant that it was implicit in the test of 'one year after evidence of facts, sufficient in the opinion of the Commissioners to justify the making of the assessment' that the Tribunal did have the jurisdiction to consider whether HMRC should have acted more promptly but could only find in the appellant's favour if HMRC acted unlawfully in a public law sense in not acting more promptly *or* he meant that the question of whether HMRC should have acted more promptly was a public law question which was not within the jurisdiction of the Tribunal.

27. In the recent *ERF* case, it was clear that ERF's legal case was that this point (5) in *Pegasus* gave the Tribunal jurisdiction to allow the appeal if HMRC had been *Wednesbury* unreasonable in not making a different assessment on a date more than a year before they actually did. I will refer to this as the 'different assessment test'. The Upper Tribunal did not decide whether the 'different assessment test' was one which the Tribunal had jurisdiction to consider (see last sentence of [32]) but proceeded on the basis that it did and held that, even on that test, the assessment in that case was timely.

28. It seems to me, therefore, that it is uncertain which of the two possible interpretations of *Pegasus* (5) is correct. Whether the FTT has the jurisdiction to consider allegations that HMRC was *Wednesbury* unreasonable not making a different assessment earlier than the actual assessment is clearly something that does not allow for an immediate answer (or the Upper Tribunal in *ERF* would have given it) and is something that requires 'detailed argument and mature consideration'. If the appellant's case on time-limits turns on this, it is clearly something that must go to trial.

29. I move onto consider the appellant's factual case on timing, because if its factual case does not stand up even if it were to succeed on its legal propositions, then there is no point in having a full hearing.

The appellant's factual case on 'sufficient evidence of facts'

The actual assessment test – knowledge of liability

30. As I have said, the Tribunal has clear jurisdiction to consider whether the assessment which was actually made was made within one year of sufficient evidence of facts coming to HMRC's knowledge.

31. In this appeal, HMRC appear to accept that, on 21 November 2016 (when the appellant sent them Worldpay's terms and conditions), they knew enough to form their view that the supplies which the appellant treated as exempt should have been treated as standard rated. The first assessment, for period 09/13, on 27 September 2017 was within 12 months of this date but none of the others were.

32. The appellant does not accept that HMRC was only able to form the view as to the liability of the supplies from receipt of the Worldpay Terms and Conditions. It considers the evidence shows HMRC knew enough much earlier. HMRC had first visited the appellant October 2016; and for a few years before that had visited the appellant's sister company with which it was now VAT grouped. The appellant's case is that HMRC must have known from its visits to the sister company that TAL was treating its supplies as exempt; and it says it believes (although has not yet got the evidence to prove it but hopes disclosure will make clear) that HMRC had formed the view by some point in 2015 that TAL's supplies were in law standard rated. It says HMRC's (alleged) advice in 2015 to the sister company and TAL to form a group indicates that HMRC knew enough to know TAL's supplies were standard rated.

33. My view is that there is a clear dispute over the evidence of when HMRC had sufficient knowledge of the nature of the appellant's supplies. I was in no position to decide whether the appellant's case on this had a reasonable prospect of success. If this was the dispute between the parties, the matter would have to be left for trial in so far as period 09/13 was concerned. So far as the other assessments under appeal no TC/18/2006 were concerned, even on HMRC's case HMRC knew enough to form the view they were standard rated more than a year before and therefore if this was the extent of the dispute, it would appeal the appeal in respect of those assessments should be allowed.

The actual assessment test – knowledge of quantum

34. However, HMRC's position was that the date of receipt of the worldpay data was irrelevant to the time-limit because (they say) they did not have the data to calculate the quantum of the assessments until the appellant supplied schedules of historic booking fee revenue on 13 October 2017. The assessments were all made, or in the case of 9/13 period, revised, on 22 December 2017, well within one year of this date.

35. As a matter of undisputed fact, booking fee revenue data had been sent by the appellant to HMRC on 1 February 2017: HMRC had not been able to reconcile this information to the VAT returns and asked for clarification. It was the revised schedules of booking fee data which were provided on 13 October 2017 in response to this request which HMRC say enabled them to make the assessments the subject of TC/18/2006.

36. Whether or not the 1 February 2017 data was sufficient evidence of fact or not does not appear to matter because the assessments were made on 22 December 2017. What is relevant is that it appears that the appellant accepts that, as matter of fact, HMRC did not have the information on quantum more than one year before the assessments were made.

37. The appellant points out that HMRC could have made an estimated assessment based on the appellant's VAT returns which showed total output tax figure and total value of supplies figure: the difference between the two could be estimated to be the supplies treated as exempt but which HMRC considered to be standard rated. And indeed, this is what HMRC appears to

have done with the assessment for 9/13 in order to avoid it going out of time under the four year rule; they then revised it downwards when the booking fee revenue data was received.

38. But it appeared accepted that the VAT return information was insufficient for the assessments which were actually made because the appellant made outside the scope supplies the VAT-free status of which HMRC did not quarrel with. It follows HMRC could not have known the exact amount of the supplies actually treated as exempt (rather than outside the scope) until they received the booking fee information. In other words, the VAT return did not distinguish between supplies treated as outside the scope of VAT and those treated as exempt from VAT and so the VAT return did not enable HMRC to calculate the exact quantum of the assessments which they made.

39. It follows that the appellant's case, in so far as it relies on 'actual assessment' test must fail with respect to all of the assessments which depended on the booking fee data. That applies to all the assessments under appeal reference TC/18/2006 bar the 09/13 period. And I will deal with the assessment for the 09/13 period below.

The different assessment test – knowledge of liability

40. The dispute between the parties is that the appellant does not consider the date of receipt of the booking fee data relevant to the time limit. As I understand it, the appellant's case was that HMRC could have made estimated assessments at an earlier date. Indeed, in order to get within the 4 year time limit, HMRC did make an estimated assessment for the first period of 09/13 before receipt of the booking fee data.

41. The allegation of unreasonableness was, I understood, made on the basis that it was the appellant's case that HMRC knew the nature of TAL's business by 2015 or early 2016 at the latest following its investigation into TAL's sister company and so, at that point, could have made a (different) assessment based on TAL's VAT returns.

42. While it is accepted that HMRC did not have actual knowledge of quantum until much later, it follows that that is not really relevant to the 'different assessment test' which is looking at whether HMRC acted unreasonably. It would be clearly arguable that HMRC acted unreasonably if, having identified that the appellant had treated its VAT liability incorrectly, HMRC failed to check into the quantum, say, by requesting the booking fee information at that point in time.

43. So the 'different assessment test' is whether 'a different assessment could and should have been made earlier….' It is clear from what I said at [32] there is a dispute over what exactly HMRC knew about TAL's supplies in 2013-15; it is less clear that the appellant's case that HMRC acted *Wednesbury* unreasonably in not making earlier estimated assessments factually has much chance of success. But I do think this is a situation where disclosure (if ordered) may provide further evidence moreover the witness evidence may impact the assessment of the documentary evidence already provided.

44. Taking into account 'the evidence that can reasonably be expected to be available at trial' and that oral evidence about HMRC's contact with TAL's sister company will be given, I have not been satisfied that this aspect of the appellant's case does not have a reasonable prospect of success and is therefore is not fit for trial. I will not strike out TC/18/2006 on this point.

DOES THE APPELLANT'S CASE ON LIABILITY OF ITS SUPPLIES HAVE A REASONABLE PROSPECT OF SUCCESS?

45. The law, in the form of the Principle VAT Directive ('PVD') provides for exemption for the following financial transactions:

> Transactions, including negotiation, concerning deposit and current accounts, payments, transfers, debts, cheques and other negotiable instruments, but excluding debt collection
>
> Art 135(1)(d) PVD

46. The meaning of this in the context of card payment services was considered by the CJEU in *Bookit* C-607/14 (2016). In that case the card handling service provided by the taxpayer in that appeal was found to be standard rated and not exempt. HMRC's position is that there is no relevant distinction between Bookit's card handling service and TAL's card handling service and therefore TAL has no reasonable prospect of succeeding in its appeal on the basis its suppliers were exempt.

47. The appellant's case is that its card handling services are sufficiently different to that in *Bookit* for it to have a realistic prospect of persuading the Tribunal that its supplies of card handling services are exempt.

48. I was referred to the card handling services provided by Bookit as described by the CJEU at [31] which were (in summary) as follows:

(1) Bookit offered Odeon cinema tickets for sale. It would obtain, from the would-be purchaser of the cinema-ticket the data pertaining to the debit card or credit card that the purchaser wanted to use to purchase the ticket;

(2) Bookit transmitted that data to its merchant acquirer, which in turn transmitted the data to the card issuer (ie the cinema-ticket purchaser's bank which issued the card). The card issuer, if it approved the transaction, would issue an 'authorisation code' to the merchant acquirer;

(3) Bookit then received (in a matter of moments) the authorisation code from the merchant acquirer and effected the sale of the tickets to the purchaser;

(4) At the end of the day, Bookit would send to the merchant acquirer a settlement file listing the authorisation codes of all the sales actually effected in the course of the day. The merchant acquirer would provide the codes to the card issuers, who would then transfer the funds to the merchant acquirer.

(5) Bookit would then be paid, and would pay Odeon the costs of the tickets, retaining its own card services fee.

49. The appellant's pleading was that its service was significantly different to Bookit's such that it was an exempt service. The distinctions on which the appellant relied were:

(a) TAL's was a one stage and not two stage process, as it was in *Bookit*. TAL would transmit the data to the merchant acquirer, who would submit the data to the card issuer; and if the card issuer approved the transaction, the transfer of funds would take place immediately (or later if the banks were not open at the time). There was no stage (4) as set out above.

(b) Linked with the above, the appellant's case was that it was paid simultaneously with the sale made to the ticket-purchaser. Bookit was only paid after the sale.

(c) Bookit was wholly owned by Odeon and only sold Odeon tickets; TAL is independent and sells tickets on behalf of third parties.

(d) Bookit's fee was apparently fixed; TAL's fee would vary from transaction to transaction depending on type of event and other factors.

50. Ms Barnes did not accept all these distinctions were correct. For instance, she did not accept payment was simultaneous with the sale. But it was her position that even if the appellant was correct to distinguish itself factually from the Bookit case on these grounds, none of the differences would lead to a different outcome. Her case was that card handling services of the type provided by the appellant were clearly standard rated on a proper understanding of what the CJEU said in *Bookit.*

51. I consider that the CJEU's decision did give a narrow interpretation of the financial exemption. It said at [41] that the test for exemption was 'whether the transaction under consideration causes the actual or potential transfer of ownership of the funds concerned' and they then explained [44-45] that it was not enough that transaction was 'essential' to transfer of ownership of funds; it appeared from [47] that it must actually effect the transfer of funds, which the card handling service provided by Bookit did not do as the card handler was not the bank or merchant acquirer and nor did it have the power to instruct the transfer of funds (which could only be done by the card holder). The CJEU saw the card handling service provider simply as someone which is requesting payment. It was not effecting the transfer of funds.

52. The CJEU then went on to make more general statements explaining why the rationale of the exemption would not cover a person providing the services of card handling. The court said:

> [54]… [a card-handling service] cannot be deemed to be, by its nature, a financial transaction …unless the view is taken that any trader that takes steps necessary for the receipt of payment by …card…is undertaking a financial transaction for the purposes of these provisions, which would render that concept meaningless and would be contrary to the requirement that VAT exemptions must be interpreted strictly.

53. The court went on to say at [55] that it would be against the rationale of the finance exemption to grant exemption for card handling because the purpose was 'to alleviate the difficulties connected with determining the tax base and the amount of VAT deductible and to avoid an increase in the cost of consumer credit…' whereas with card handling it was possible [56] to readily determine the fee and there was no provision of credit. The court's conclusion was:

> 'Such a service cannot therefore properly be the subject of an exemption under Art 135(1)(d) [PVD]'.

54. Mr Paulin's position was that, while I might think the appellant's case weak, it was wrong to see it as hopeless. The factual matrix was not the same as in *Bookit* and the appellant's case that it was proper to distinguish it from *Bookit* was not unfit for trial; the finance exemption was complex and something which required 'detailed argument and mature consideration' following submissions at a full hearing.

55. While I accept that there are factual distinctions with *Bookit.* I agree with Ms Barnes that it is extremely difficult, in the light of what the CJEU said, to see how they could properly distinguish the two cases. Mr Paulin did not really explain why he thought the differences he outlined did distinguish the two cases.

56. The (alleged) distinction he emphasised most was that TAL had a one stage process and the transfer of the funds was therefore (at least in many cases) simultaneous with the request for the funds transfer. I cannot see how that distinction (if proved) would matter as the CJEU's decision did not rest on the time delay in *Bookit* between the request for the transfer of funds

and the actual transfer of the funds: the decision rested on the fact that the card-handler was a middleman between the card holder and bank/merchant acquirer and was simply requesting payment rather than actually transferring the funds.

57. The CJEU's decision in *Bookit* was not one which rested on fine distinctions but one of principle and that principle was that a card-handling service was not exempt. I agree with Ms Barnes that, taking into account what the CJEU said, it is not really possible to see how a national court or tribunal could reach the conclusion that TAL's services were exempt, even if the above distinctions were proved.

58. It seems to me that this case clearly falls on the side of the line in *Arcadia* of being one which is suitable for summary determination since it is bad in law; detailed arguments and mature consideration will not alter the position stated by the CJEU that card-handling services are not exempt.

OVERALL CONCLUSION ON HMRC'S APPLICATION TO STRIKE OUT THE APPEAL

59. The only ground of appeal in TC/18/2194 (the 2016 assessments) was that the supplies were exempt. I have found that that ground of appeal does not have a reasonable prospect of success. For this reason, TC/18/2194 is hereby struck out.

60. The only ground of appeal in TC/18/4106 (back-dating of registration) was that the supplies of card-handling services were exempt. I have found that that ground of appeal does not have a reasonable prospect of success. For this reason, TC/18/4106 is hereby struck out.

61. There were two grounds of appeal in TC/18/2006 (the assessments covering 2013-31/1/2016): those grounds were that the assessments were out of time and wrong because the supplies were exempt. The second ground of appeal is STRUCK OUT as it does not have a reasonable prospect of success.

62. On the question of the timeliness of the assessments, the case in so far as it a case that the assessments were out of time because they were raised more than 12 months after sufficient evidence came to HMRC's knowledge to justify the actual assessments made, this is STRUCK OUT in so far as all of the assessments are concerned save for period 09/13. This is because the case is factually without reasonable prospect of success (save in respect of period 09/13).

63. But in so far as the appellant's case is under *Pegasus* (5) (in other words, that it was *Wednesbury* unreasonable for HMRC not to make a different assessment earlier) this is not struck out in relation to any of the assessments appealed under TC/18/2006. Both the legal and factual case is left open to be argued at trial.

RIGHT TO APPLY FOR PERMISSION TO APPEAL

64. 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.

BARBARA MOSEDALE
TRIBUNAL JUDGE

RELEASE DATE: 31 MAY 2019