[2019] UKFTT 456 (TC)

TC07261

VALUE ADDED TAX –- Kittel denial of input tax – strike out applications - whether issue estoppel applies – no – whether HMRC should be barred from part of the proceedings – no – – whether Appellant's appeal should be struck out in part – no - whether HMRC's Statement of Case may be amended - yes

FIRST-TIER TRIBUNAL
TAX CHAMBER

Appeal number: TC/2016/05430

BETWEEN

MICRORING LIMITED **Appellant**

-and-

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

TRIBUNAL: JUDGE VICTORIA NICHOLL

Sitting in public at Taylor House, London on 18 April 2019

Christopher McNall, counsel, instructed by LGSA Solicitors, for the Appellant

Joshua Carey, counsel, instructed by the General Counsel and Solicitor to HM Revenue and Customs, for the Respondents

DECISION

INTRODUCTION

1. The applications the subject of this decision relate to an appeal made by the Appellant ("Microring") against decisions by the Respondents ("HMRC") to refuse input tax recovery on *Kittel* grounds. This decision concerns cross applications by Microring for HMRC to be barred from part of the proceedings and by HMRC to strike out the same part of the Appellant's appeal and to amend their Statement of Case. The grounds for both applications are that the First-tier Tax Tribunal ("FTT") found in *Quality Engine Distribution Ltd v HMRC* [2018] UKFTT 0151 (TC) [53] ("*QED*") that the appellant had not made supplies of scrap silver to Microring. Microring argues that HMRC's *Kittel* based refusal in respect of the supplies by Quality Engines Ltd ("QEDL") must fail as the fact that the supplies were not made is *res judicata*. HMRC argues that *QED* means that there is no supply in respect of which the input tax claim can be made.

BACKGROUND, FACTS AND APPLICATIONS

2. Microring was incorporated on 9 June 1976. Its VAT1 application recorded its main business as sales of jewellery and the appeal documents refer to it as a trader in precious metals.

3. On 1 December 2016 HMRC notified Microring of a decision ("the Microring decision") to refuse entitlement to the right to deduct input tax as HMRC were satisfied that the transactions listed in the notice were connected with fraudulent evasion of VAT and that Microring knew or should have known that this was the case. The transactions listed were purchases of silver from QEDL on 4 and 16 February 2016. The total input tax denied in respect of the 03/16 period is £60,052.

4. Microring appealed against the Microring decision to the Tribunal on 7 December 2016. The grounds of appeal are that HMRC is "specifically put to proof as to":

> "1. The existence of a scheme to defraud the Revenue;
>
> 2. The existence of a continuing loss;
>
> 3. The steps taken to reduce the said tax loss;
>
> 4. The contention that the relevant transactions are "connected" to the said fraud.;
>
> 5. The date and full details of due diligence checks undertaken by the Commissioners in this dispute to be satisfied that the transactions "are connected with fraudulent evasion of VAT in the supply chain"."

5. HMRC had notified Microring of a decision to refuse entitlement to the right to deduct input tax in respect of another eight transactions on 21 September 2016. The transactions listed in the notice were also purchases of scrap silver, but from three different suppliers from QEDL, and the total input tax denied in respect of the 12/15 and 03/16 period by this earlier decision is £250,132. Microring appealed against this decision to the Tribunal on 10 October 2016.

6. The Tribunal consolidated the two appeals by Microring. The applications the subject of this decision therefore relate to two of the ten transactions under the consolidated appeal but, for the purposes of this decision, references to the appeal are to the appeal in respect of the two QEDL transactions.

7. HMRC also made a decision to assess QEDL in respect of the output tax the subject of the Microring decision. This was despite the fact that HMRC Officer Booth noted in an email dated 20 July 2016 that he did not think that HMRC had enough "solid evidence to raise an

assessment". The decision was taken to proceed for reasons that included the fact that it would show that HMRC had "explored all avenues".

8. QEDL appealed against the assessment. The parties to the litigation were HMRC and QEDL.

9. HMRC filed its Statement of Case ("SOC") in this appeal on 17 November 2017. The SOC noted that QEDL had appealed to the Tribunal against the assessment.

10. The QEDL appeal was heard on 8 December 2017. Judge Chapman and Mrs Akhtar allowed the appeal in the *QED* decision released on 21 March 2018 that concluded "it follows from our findings of fact that QEDL did not supply the Silver that there was no taxable (or any) supply by QEDL and so the appeal must be allowed." HMRC have not appealed against the decision in *QED*. On 12 October 2018 Microring's representative wrote to HMRC asking it to withdraw the Microring decision given the findings in *QED*. HMRC responded that the decision of another First-tier Tribunal was not binding.

Applications

11. On 19 November 2018 Microring made an application to the Tribunal for orders:

(1) That the Respondent's Statement of Case, insofar as it relates to the denial of input tax in the sum of £60,052 input tax for the period 03/16, should be struck out pursuant to Rules 8(2)(a) and /or Rule 8(3)(c) (as applicable to the Respondents by virtue of Rule 8(7) (a));

(2) That the Appellant's Appeal in relation to the denial of input tax in the sum of £60,052 for the period 03/16 should accordingly be summarily determined in favour of the Appellants;

(3) That the Tribunal's case management directions (14 June 2018) be stayed pending determination of this Application;

(4) Alternatively to (1), that the present Application be transferred to the Tax and Chancery Chamber of the Upper Tribunal for it to use its judicial review powers. This part of the application was no longer pursued at the hearing.

12. On 15 January 2019 HMRC made a cross-application to the Tribunal for the following directions:

(1) That the Respondents be granted leave to file and serve an Amended Statement of Case dated 11 January 2019; and

(2) The Appellant's appeal insofar as it relates to two transactions connected with Quality Engine Distribution Limited be struck out as they have no reasonable prospect of success.

RELEVANT LAW

Tribunal Rules

13. The applications the subject of the hearing were made and are considered in accordance with the following Tribunal Rules:

(1) Rule 2 - Overriding objective and parties' obligation to co-operate with the Tribunal

> "(1) The overriding objective of these Rules is to enable the Tribunal to deal with cases fairly and justly. Dealing with a case fairly and justly includes—
> (2) (a) dealing with the case in ways which are proportionate to the importance of the case, the complexity of the issues, the anticipated costs and the resources of the parties;

(b) avoiding unnecessary formality and seeking flexibility in the proceedings;

(c) ensuring, so far as practicable, that the parties are able to participate fully in the proceedings;

(d) using any special expertise of the Tribunal effectively; and

(e) avoiding delay, so far as compatible with proper consideration of the issues.

(3) The Tribunal must seek to give effect to the overriding objective when it—

(a) exercises any power under these Rules; or

(b) interprets any rule or practice direction.

(4) Parties must—

(a) help the Tribunal to further the overriding objective; and

(b) co-operate with the Tribunal generally."

(2) Rule 5 - Case management powers

"(1) Subject to the provisions of the 2007 Act and any other enactment, the Tribunal may regulate its own procedure.

(2) The Tribunal may give a direction in relation to the conduct or disposal of proceedings at any time, including a direction amending, suspending or setting aside an earlier direction.

(3) In particular, and without restricting the general powers in paragraphs (1) and (2), the Tribunal may by direction—

(a) extend or shorten the time for complying with any rule, practice direction or direction, unless such extension or shortening would conflict with a provision of another enactment setting down a time limit;

(b) consolidate or hear together two or more sets of proceedings or parts of proceedings raising common issues, or treat a case as a lead case (whether in accordance with rule 18 (lead cases) or otherwise);

(c) permit or require a party to amend a document;

(d) permit or require a party or another person to provide documents, information or submissions to the Tribunal or a party;

(e) deal with an issue in the proceedings as a preliminary issue;

(f) hold a hearing to consider any matter, including a case management hearing;

(g) decide the form of any hearing;

(h) adjourn or postpone a hearing;

(i) require a party to produce a bundle for a hearing;

(j) stay (or, in Scotland, sist) proceedings;

(k) transfer proceedings to another tribunal if that other tribunal has jurisdiction in relation to the proceedings and, because of a change of circumstances since the proceedings were started—

(i) the Tribunal no longer has jurisdiction in relation to the proceedings; or

(ii) the Tribunal considers that the other tribunal is a more appropriate forum for the determination of the case;

(l) suspend the effect of its own decision pending the determination by the Tribunal or the Upper Tribunal, as the case may be, of an application for permission to appeal, a review or an appeal."

(3) Rule 8 - Striking out a party's case

"(1) The proceedings, or the appropriate part of them, will automatically be struck out if the appellant has failed to comply with a direction that stated that failure by a party to comply with the direction would lead to the striking out of the proceedings or that part of them.

(2) The Tribunal must strike out the whole or a part of the proceedings if the Tribunal—

(a) does not have jurisdiction in relation to the proceedings or that part of them; and
(b) does not exercise its power under rule 5(3)(k)(i) (transfer to another court or tribunal) in relation to the proceedings or that part of them.
(3) The Tribunal may strike out the whole or a part of the proceedings if—
(a) the appellant has failed to comply with a direction which stated that failure by the appellant to comply with the direction could lead to the striking out of the proceedings or part of them;
(b) the appellant has failed to co-operate with the Tribunal to such an extent that the Tribunal cannot deal with the proceedings fairly and justly; or
(c) the Tribunal considers there is no reasonable prospect of the appellant's case, or part of it, succeeding.
(4) The Tribunal may not strike out the whole or a part of the proceedings under paragraphs (2) or (3)(b) or (c) without first giving the appellant an opportunity to make representations in relation to the proposed striking out.
(5) If the proceedings, or part of them, have been struck out under paragraphs (1) or (3)(a), the appellant may apply for the proceedings, or part of them, to be reinstated.
(6) An application under paragraph (5) must be made in writing and received by the Tribunal within 28 days after the date that the Tribunal sent notification of the striking out to the appellant.
(7) This rule applies to a respondent as it applies to an appellant except that—
(a) a reference to the striking out of the proceedings must be read as a reference to the barring of the respondent from taking further part in the proceedings; and
(b) a reference to an application for the reinstatement of proceedings which have been struck out must be read as a reference to an application for the lifting of the bar on the respondent taking further part in the proceedings.
(8) If a respondent has been barred from taking further part in proceedings under this rule and that bar has not been lifted, the Tribunal need not consider any response or other submissions made by that respondent, and may summarily determine any or all issues against that respondent."

(4) Rule 25 - Respondent's statement of case

"(1) A respondent must send or deliver a statement of case to the Tribunal, the appellant and any other respondent so that it is received—
(a)…
(b)…
or
(c) in a Standard or Complex case other than an MP expenses case, within 60 days after the Tribunal sent the notice of appeal or a copy of the application notice or notice of reference.
(2) A statement of case must—

(a) in an appeal, state the legislative provision under which the decision under appeal was made; and
(b) set out the respondent's position in relation to the case.
(3) A statement of case may also contain a request that the case be dealt with at a hearing or without a hearing.
…"

Res Judicata and Abuse of Process

14. I was referred to the following authorities in relation to res judicata:

(1) Lord Sumption's guidance in *Virgin Atlantic Airways Ltd v Zodiac Seat UK Limited* [2014] AC 160 ("*Virgin Atlantic*") (at [17]):

> "Res judicata: general principles Res judicata is a portmanteau term which is used to describe a number of different legal principles with different juridical origins. As with other such expressions, the label tends to distract attention from the contents of the bottle. The first principle is that once a cause of action has been held to exist or not to exist, that outcome may not be challenged by either party in subsequent proceedings. This is "cause of action estoppel". It is properly described as a form of estoppel precluding a party from challenging the same cause of action in subsequent proceedings.
> [...]
> Fourth, there is the principle that even where the cause of action is not the same in the later action as it was in the earlier one, some issue which is necessarily common to both was decided on the earlier occasion and is binding on the parties: *Duchess of Kingston's Case* (1776) 20 St Tr 355. "Issue estoppel" was the expression devised to describe this principle by Higgins J in *Hoysted v Federal Commissioner of Taxation* (1921) 2 9 CLR 537, 561 and adopted by Diplock LJ in *Thoday v Thoday* [1964] P 181, 197-198.
> Fifth, there is the principle first formulated by Wigram V-C in *Henderson v Henderson* (1843) 3 Hare 100, 115, which precludes a party from raising in subsequent proceedings matters which were not, but could and should have been raised in the earlier ones.
> Finally, there is the more general procedural rule against abusive proceedings, which may be regarded as the policy underlying all of the above principles ..."

(2) *Arnold and others v National Westminster Bank plc* [1991] 3 All ER 41("*Arnold*") in which Lord Keith of Kinkel described issue estoppel as follows:

> "Issue estoppel may arise where a particular issue forming a necessary ingredient in a cause of action has been litigated and decided and in subsequent proceedings between the same parties involving a different cause of action to which the same issue is relevant one of the parties seeks to reopen that issue."

(3) *Hollington -v- Hewthorn and Company and Anor* [1943] KB 587 at 596 – 597 ("*Hollington*") in which the Court of Appeal considered that a judgment is not conclusive against anyone who was not a party.

(4) *CCA Distribution Limited -v- The Commissioners for HM Revenue and Customs* [2013] UKFTT 253 (TC) ("*CCA*") that considered whether "previous findings" can bind the Tribunal.

Strike out

15. I was referred to the following authorities with regard to the applications to strike out:
(1) *The First De Sales Limited Partnership and Ors -v- Revenue and Customs Commissioners* [2018] UKUT 396 (TCC) ("*The First de Sales*") (Mr Justice Carr and Judge Sinfield) which cites a detailed statement of principles in respect of applications for summary judgment that was set out by Lewison J in *Easyair Ltd (t/a Openair) v Opal Telecom Ltd* [2009] EWHC 339 (Ch) at [15] and that was subsequently approved by the Court of Appeal in *AC Ward & Sons v Caitlin Five Limited* [2009] EWCA Civ 1098.

Amendment of Statement of Case

16. I was referred to the following authorities with regard to the application for permission to amend the Statement of Case:

(1) *McPhilemy v Times Newspapers Limited* [1999] 3 All ER 775 (1) ("*McPhilemy*") at 792 and 793 in which the Court of Appeal stated:

> "Unless there is some obvious purpose to be served by fighting over the precise terms of a pleading contests over the terms are to be discouraged".

(2) *The Commissioners for HM Revenue and Customs v BUPA Purchasing Limited and Ors* [2007] All ER (D) 84 ("*BUPA*") in which Arden LJ found that the reasons for an assessment do not form part of an assessment under s 73(1) that cannot be changed.

(3) *William Martland v HMRC* [2018] UKUT 0178 0178 (TCC) (*Martland"*) that sets out guidance for the FTT when considering applications for permission to appeal out of time. This is to consider (i) the length of the delay, and whether it is serious and significant; (ii) the reasons for that delay, and whether they are good ones; and (iii) whether, in all the circumstances of the case, it would be right to allow the amendments.

(4) *Tower Bridge GP -v- The Commissioners for HM Revenue and Customs* [2019] UKFTT 176 (TC) ("*Tower Bridge*") in which Judge Rupert Jones outlined the ordinary types of defaults in MTIC cases.

(5) *QED* in which Judge Chapman made the following concluding comments*:*

> "Thirdly, we accept Mr Rafiq's evidence that the movements in QEDL's account represent Mr Healey using QEDL for his own purposes rather than representing payment to QEDL by Microring for the Silver. We believe the central strand running through Mr Rafiq's evidence that he did not ask Mr Healey or anybody else to deposit the monies in QEDL's account and that he obtained Mr Healey's instructions as to where to pay it back to. It must be said that we do have our concerns as to those transactions. Mr Rafiq was repaying the funds to a party he had never heard of, which was different to the company which paid it into QEDL's account and had no apparent connection to Mr Healey. He did this without satisfying himself as to whether or not there was a risk of involving himself or QEDL in money laundering or other fraudulent activities. However, we make no findings in this regard; it is sufficient for the purposes of this appeal that, whatever the true purpose of these receipts and payments were, they did not represent payment to QEDL from a customer, or payment by QEDL to a supplier, in respect of the Silver.
>
> Fourthly, we accept Mr Haley's diplomatically put submission that there are features of Mr Rafiq's explanation which are puzzling. In particular, the fact that payment was made to QEDL when the purchase was said to be of the shares, the absence of any paperwork, the fact that Mr Healey treated QEDL as his own from the outset, the fact that Mr Healey did not call for the whole sums to be returned, the retention of the £4,897.03, and Microring's unexplained possession of QEDL's electricity bill."

DISCUSSION

17. I have considered the applications and the relevant Tribunal Rules and case law referred to by the parties. The issue at the core of the appeal is whether a supply by, or connected with, QEDL was made to Microring in respect of which the input tax recovery can be claimed or denied. There are three possible findings on this issue:

(1) There was a supply that that was connected to fraud;

(2) There was a supply that was not connected to fraud;

(3) There was no supply.

18. The applications made by the parties address these scenarios and each party contemplates both that there may, and that there may not, have been a supply. Microring's application seeks

to argue that HMRC's *Kittel* input tax denial should be struck out because of the findings in *QED* that there was no supply by QEDL, but it does not make any 'admission' (sic) in that regard. HMRC's application in response seeks to amend its SOC to put Microring to strict proof that it received a taxable supply the subject of its input tax recovery claim given the findings in *QED* that there was no supply by QEDL, and to argue that a supply was made by a "hijack" of the trader.

Res judicata

19. In the light of these alternative scenarios and the findings in *QED*, Mr McNall referred me to the following extract from the House of Lords decision in Re B (Children) (Care Proceedings: Standard of Proof) [2008] UKHL 35:

> "If a legal rule requires a fact to be proved (a "fact in issue"), a judge or jury must decide whether or not it happened. There is no room for a finding that it might have happened. The law operates a binary system in which the only values are 0 and 1. The fact either happened or it did not. If the tribunal is left in doubt, the doubt is resolved by a rule that one party or the other carries the burden of proof. If the party who bears the burden of proof fails to discharge it, a value of 0 is returned and the fact is treated as not having happened. If he does discharge it, a value of 1 is returned and the fact is treated as having happened."

20. Mr McNall submits that there is no scope for the Tribunal to find that a fact "might have" happened. There can be no Schrödinger's cat interpretation of the facts. The facts were established in *QED* and res judicata applies with the result that HMRC is bound by the findings of the FTT in *QED*. The articulation of res judicata in *Virgin Atlantic* (in paragraph 14(1) above) sets out the principles which should be applied, with the result that HMRC should be precluded from taking part in this part of the proceedings.

21. Mr Carey submits that res judicata is not in point as Microring was not a party to the proceedings in *QED* and that the issues are not the same in this appeal in any event. As Microring is aware, HMRC must show that the transactions are connected with fraud and they may argue in this context that the supplies were made by a "hijacked" trader, but HMRC do not have to prove that a taxable supply took place. These questions remain to be considered by the Tribunal.

22. Mr Carey referred me to the following passage in *Hollington* (per Goddard CJ) that makes clear that a judgment is not conclusive against anyone who was not a party:

> "Thus, if A sues B, alleging that owing to B's negligence he has been held Liable to pay xl. to C, the judgment obtained by C is conclusive as to the amount of damages that A has had to pay C, but it is not evidence that B was negligent: see Green v. New River Co. (1), and B can show, if he can, that the amount recovered was not the true measure of damage."

23. Mr Carey also me referred to the following extract in CCA:

> "As a matter of law, it is not open to a tribunal to rely upon a finding of fact by another tribunal; this is quite clear from the judgment of the Privy Council in the case of *Calyon* v. *Michailaidis* [2009] UKPC 34. This confirmed that the principle in *Hollington* v. *Hewthorn* is good law, and has only been amended by statute with respect to the admissibility of criminal convictions."

24. I agree with Mr McNall that the authorities make it clear that the Tribunal's finding in *QED* that QEDL did not make a supply of silver to Microring is res judicata as between QEDL

and HMRC. It is also clear that the findings of fact made in *QED* relate to the same transactions as the transactions in this appeal, but it is key that the parties, issues and the outcomes sought by HMRC in the two appeals are different. In *QED* HMRC sought the payment of the output tax from QEDL. This was a step taken to reduce the tax loss as required. In this appeal HMRC seeks to deny the repayment of input tax claimed by Microring. Microring does not admit that it did not receive a supply from QEDL, and it has not withdrawn or amended its input tax recovery claim. HMRC must prove the existence of a scheme to defraud HMRC and that the relevant QEDL transactions are "connected" to the fraud, but it is not the same issue as whether a taxable supply was made. In short, neither the parties nor the issues between the parties are the same.

25. Applying the guidance in *Virgin* and *Arnold* to these facts issue estoppel is not in point as these proceedings are not between the same parties as in *QED*. Indeed, as the Court of Appeal commented in *Hollington*, in these circumstances it is "in the interests of justice that on the subsequent trial the court should come to a decision on the facts placed before it without regard to the result of other proceedings before another tribunal."

26. Mr McNall also referred me specifically to the fifth and final principles cited by Lord Sumption in *Virgin Atlantic* (paragraph 14(1) above). The fifth is the principle first formulated by Wigram V-C in *Henderson v Henderson* (1843) 3 Hare 100, 115, which precludes a party from raising in subsequent proceedings matters which were not, but could and should have been raised in the earlier ones. The final principle is the general procedural rule against abusive proceedings. Mr McNall submits that it would be an abuse of proceedings if HMRC were to be allowed to raise a question of fact, such as an allegation of fraud or of hijack of QEDL's VAT registration, in this appeal that could have been raised in *QED*.

27. I do not accept that the proceedings in *QED* preclude HMRC raising the application of *Kittel* to Microring's recovery claim. Microring's decision to make no admission with regard to the QEDL supply does not allow it to escape the consequences of HMRC's decision to deny its input tax recovery claim. If it accepts that it received no supply of silver from QEDL then it should amend its VAT return claiming the input tax recovery. If it continues to reclaim the input tax, HMRC is entitled to consider the validity of the claim. The closing comments made by Judge Chapman (cited in paragraph 16(5) above) do not bind the Tribunal in this appeal, but they provide the flavour of the issues to be considered at the substantive hearing. Microring will have the opportunity to challenge HMRC's case. There is no abuse of proceedings by HMRC.

Amendment of SOC

28. This leads to the question of whether HMRC should be allowed to amend its SOC. HMRC submit that this application is in response to Microring's application for HMRC to be barred from the proceedings because of the findings in *QED* that no supply was made by QEDL, but they note that Microring has not applied to amend its grounds of appeal to raise this argument. On the basis however that the findings in *QED* have been raised in this application HMRC's draft amendments to the SOC assert, in the alternative to the *Kittel* grounds, that there has not been a taxable supply by a taxable person. The amendment puts Microring to strict proof that it received a taxable supply from a taxable person as it has purported to claim the input tax on the basis of the supply.

29. Microring argues that HMRC is seeking to make a different decision on a different basis by the addition of the proposed amendments to their SOC. Microring claim that this is an abuse of the Tribunal's process. Microring submits that the Tribunal should apply the approach endorsed in *Martland* in considering this application on the basis that, in order to amend, HMRC needs a substantial extension of time.

30. I have considered Arden LJ's comments in *BUPA* that address the question of whether the reasons which must be given for an assessment under section 73 VATA form part of the assessment which cannot be changed without a power to do so:

> "It is common ground that as a matter of public law the Commissioners must provide the basis on which they make an assessment. In other words, they must supplement the assessment with a notification of the reasons. But this duty is grounded in public law, and not in the statute.
>
> The duty of the Commissioners under public law may be discharged by the provision of the estimates as to input and output tax on which the assessment is based. In other cases it may need supplementary narrative. Accordingly the fact that VATA refers to input tax and output tax and makes them part of an assessment for the purposes of s 73(1) does not mean that VATA treats the reasons required for an assessment as part of the assessment which cannot therefore be changed."

31. *BUPA* concerned changes in the figures for input and output tax for an assessment under section 73, but the amount of the assessment remained unchanged. This appeal is against a refusal to allow the Community law right to deduct input tax on *Kittel* grounds and, in the new alternative, on grounds that taxable supplies did not take place, but the refusal relates to the same input tax and the same transactions.

32. I have also considered Mr McNall's submission that I should treat this application in the same way as an application to make a late appeal and apply the guidance provided by the Upper Tribunal in *Martland*. I do not agree with this submission for two reasons. First, the applications in this case are under Tribunal Rules and relates to the conduct of an extant appeal. They require the Tribunal to apply the overriding objective in Rule 2 in considering the case management and strike out applications. In contrast the guidance in *Martland* is expressly stated to be in relation to the exercise of a statutory discretion to allow an appeal to come into existence. Second, as the exercise of discretion to allow a late appeal arises in the context of relief from sanctions, the guidance reflects the authorities that consider and apply CPR 3.9. This is not appropriate in the case of an application made in the conduct of an appeal in which there is no question of a sanction or an application for relief from that sanction.

33. I have therefore applied the overriding objective in my consideration of the application and, in order to do so, I have considered the relevant facts. First, the decision in *QED* had not been released by the time that HMRC delivered the SOC. Second, the amendments seek to reply to arguments that were not raised in Microring's grounds of appeal but are raised in its application. There has been no significant delay in making this application and it will not have taken Microring by surprise. The hearing has not been listed yet. Third, HMRC's reasons for denying the input tax recovery claim will be wider if I give permission for the amendments to the SOC to be made, but the decision remains a denial of £60,052 input recovery in respect of the 03/16 period. Finally, it is clear what the amendments seek to argue. In all the circumstances of this case I consider that it is fair and just to give my permission for HMRC to make the amendments to its SOC as outlined in the Statement of Case attached to its application.

34. The substantive hearing will therefore consider the issues in the amended SOC, presumably including the issues raised by Judge Chapman (noted in paragraph 16(5) above) and the possible "hijack" analysis. This latter point does not require an amendment to be made to the SOC. "Hijack" is within a *Kittel* challenge as Judge Rupert Jones' helpful outline of the types of default in MTIC cases in *Tower Bridge* makes clear:

> "A transaction chain in an MTIC fraud typically involves a "missing" "hijacked" or "fraudulent defaulting" trader who acquires goods from another EU member state; one or more intermediary or

> "buffer" traders and a "broker" trader. The missing or fraudulent defaulting trader is a VAT registered entity in a transaction chain who purports to acquire goods zero-rated from another EU member state, sells them in the UK charging VAT at the standard rate, and then either disappears or deliberately fails to account for the VAT due to HMRC. A "hijacked" trader adopts the identity of a VAT registered trader and takes on the role of the fraudulent defaulting trader and does not complete or submit a VAT return and deliberately does not pay the VAT when it becomes properly due."

Strike out

35. Having addressed the res judicata claim and the amendment of the SOC, I have considered the applications under Rule 8 with the assistance of the case law considered and the guidance provided by the Upper Tribunal in *The First de Sales*. This can be summarised in this case to consider (1) whether the case has a whether the claimant has a 'realistic' as opposed to a 'fanciful' prospect of success; (2) that a 'realistic' claim is one that carries some degree of conviction and that this means a claim that is more than merely arguable; and (3) that in reaching its conclusion the Tribunal must not conduct a 'mini trial' but should consider both the substance of the evidence available and what can reasonably be expected to be available at the hearing. I also note the following guidance (at paragraph 33 (vi)):

> "Although a case may turn out at trial not to be really complicated, it does not follow that it should be decided without the fuller investigation into the facts at trial than is possible or permissible on summary judgment. Thus the court should hesitate about making a final decision without a trial, even where there is no obvious conflict of fact at the time of the application, where reasonable grounds exist for believing that a fuller investigation into the facts of the case would add to or alter the evidence available to a trial judge and so affect the outcome of the case: *Doncaster Pharmaceuticals Group Ltd v Bolton Pharmaceutical Co* 100 Ltd [2007] FSR 63;"

Microring's application

36. Microring's application that HMRC should be barred from taking further part in the proceedings is on the basis either that the Tribunal does not have jurisdiction in relation to that part of the proceedings or that there is no reasonable prospect of that part of HMRC's case succeeding. The application is made on the grounds of res judicata and abuse of process.

37. I have decided for the reasons set out above that neither res judicata nor abuse of process applies to HMRC's original SOC or the amended SOC. I am satisfied that on the basis of this decision and the evidence available HMRC has a realistic prospect of success in this appeal and that it would not be fair and just for HMRC to be barred from part of the proceedings.

HMRC's application

38. HMRC's application to strike out Microring's appeal is on the basis of the argument raised in its amended SOC that there was no taxable supply. Microring has not admitted that there was no taxable supply and submits that it is for HMRC to establish the supply as it bears the evidential burden. Similarly, it submits that HMRC should not be allowed to advance the "hijack" case.

39. I have given permission for the amendments to the SOC and confirmed that "hijack" is within the *Kittel* case. Microring has not addressed these substantive arguments in any detail yet as they objected to their inclusion on the basis of res judicata and abuse of proceedings. As I have decided that res judicata is not in point in this decision, I consider that applying Rule 2, and taking account of the purpose of Rule 8(4), it would not be fair and just to strike out

Microring's appeal without giving it the opportunity to make representations by reference to all of the arguments, including those in the amendment of the SOC. This is a case in which "a fuller investigation into the facts of the case would add to or alter the evidence available" and could affect the outcome of the case. In this respect Microring's claim carries some degree of conviction and is more than merely arguable. It would not be fair and just to strike out Microring's appeal in respect of the 03/16 period at this stage.

40. In conclusion neither party has established that a direction should be made for the other party to be barred or struck out. The nature of the supplies made, if any, will like the state of Schrödinger's cat, be established when the full box of facts and argument is opened and examined at the substantive hearing of this appeal.

DECISION

41. The application for HMRC to be barred from the proceedings in relation to the QEDL supplies and the application to strike out Microring's appeal in respect of that part of the appeal are both refused.

42. Permission is given to HMRC to amend the Statement of Case as set out in the amended Statement of Case dated 11 January 2019, as attached to its application.

RIGHT TO APPLY FOR PERMISSION TO APPEAL

43. 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.

VICTORIA NICHOLL
TRIBUNAL JUDGE

RELEASE DATE: 12 JULY 2019