Neutral Citation: [2023] UKFTT 00388 (TC)

Case Number: TC 08802

**FIRST-TIER TRIBUNAL**
**TAX CHAMBER**

Sitting in London

Appeal reference: TC/2021/02831

*VALUE ADDED TAX – Tribunal procedure – company suspected of facilitating fraud – appeal by company against de-registration (on Ablessio principles) and against denial of input tax (on basis of Kittel) struck out due to the company's failure to comply with Unless Order – penalty raised on company but no appeal – liability for penalty transferred by personal liability notices raised on each of the two directors of company – appeal by one director only:*

*Application by Respondents for late admission of witness statements filed in appeal by company but which they had omitted to file by the relevant deadline in appeal by Appellant director – application allowed but with directions imposing sanction for future non-compliance*

*Application by Appellant for disclosure by Respondents of further information and document relating to the Insolvency Service's investigation of the other director following company's insolvency – application for disclosure of information allowed, application for disclosure of document dismissed*

**Heard on:** 06 April 2023
**Judgment date:** 24 April 2023

**Before**

**TRIBUNAL JUDGE BAILEY**

**Between**

**GILES ELLIS**

**Appellant**

**and**

**THE COMMISSIONERS FOR HIS MAJESTY'S REVENUE AND CUSTOMS**

**Respondents**

**Representation:**

The Appellant appearing in person

For the Respondents: Mr Joshua Carey of counsel, instructed by the General Counsel and Solicitor to HM Revenue and Customs

# DECISION

## INTRODUCTION

1. The substantive appeal made by the Appellant is against a personal liability notice in the sum of £36,259, raised by the Respondents under Section 69D VATA 1994 to make the Appellant personally liable for 50% of a penalty imposed on a company of which he was a director (that company is referred to as "ICL" throughout this decision). At the same time as raising the notice making the Appellant liable for 50% of ICL's penalty, the Respondents also raised a personal liability notice making other company director, Mr M, liable for the other 50% of ICL's penalty. Mr M is not a party to these proceedings and (it seems) did not appeal against the notice issued to him.

2. This decision concerns two applications made in relation to the potential evidence that the parties wish to rely upon, or may wish to rely upon, in these proceedings. In the order that they were received by the Tribunal those applications are:

(1) The Respondents application dated 9 December 2022, for the late admission of seven witness statements with exhibits; and

(2) The Appellant's application dated 14 March 2023 for an order for the disclosure of information and a document potentially held by the Respondents.

3. After 5 p.m. on Friday 31 March 2023 (and so treated by the Tribunal as having been received on the next working day, Monday 3 April 2023) the Tribunal received a further application from the Respondents. That application is for the admission of a witness statement (not made at the date of the application) to replace one of the seven witness statements that is the subject of the first application. Directions are given separately in respect of that application.

## OUTCOME

4. As this is a longer decision, it is appropriate to state the outcome at the beginning of my decision. I have decided that:

- The Respondents application is allowed but it is appropriate to attach an Unless Order to future Directions to ensure the Respondents' compliance with deadlines; and
- The Appellant's application is allowed in respect of the requests for information but dismissed in respect of the request for disclosure of a document.

5. Directions are issued separately for the progress of this appeal to substantive hearing.

## CHRONOLOGY OF THESE PROCEEDINGS

6. It is necessary to set out the chronology of this appeal to provide context for my decision, and it is necessary to start with the appeal of ICL.

7. The Respondents suspected ICL, a VAT registered person, of facilitating fraud. The Respondents decided to de-register ICL on *Ablessio* principles. ICL appealed to the Tribunal against de-registration, and also brought proceedings in the High Court. In the Tribunal, on 3 June 2020, Judge Poole agreed to the expedition of ICL's appeal against de-registration. Directions were issued by Judge Poole on 9 July 2020.

8. The Respondents also decided to deny ICL claimed input tax on the basis of *Kittel*. ICL appealed against that decision to the Tribunal, and this appeal was joined with ICL's de-registration appeal. Further Directions were issued by Judge Poole on 6 October 2020. However, on 26 November 2020, ICL's joined appeals were struck out for failure to comply with an Unless Order issued on 18 November 2020.

9. ICL went into liquidation on 28 January 2021.

10. Meanwhile, the Respondents issued a penalty on ICL, and then issued personal liability notices to the directors of ICL making them liable, alongside ICL, for ICL's penalty. The Appellant sought a review of that decision but the Respondents upheld their original decision. The Appellant then filed an appeal to the Tribunal. At that time, the Appellant was represented by an agent. The Appellant's grounds of appeal are that:

(1) The transactions by ICL were not connected with the fraudulent evasion of VAT by another person;

(2) The Appellant did not know nor should he have known that the transactions were connected with the fraudulent evasion of VAT;

(3) The Appellant was not directly involved in the transactions and so the level of culpability decided by the Respondents was excessive; and

(4) The Respondents had ignored his representations about the level of culpability.

11. The Appellant's appeal was late, being filed on 4 August 2021, against a review decision dated 24 May 2021. The reasons for the Appellant's lateness were that he had understood that, because of the Covid-19 pandemic, the Respondents would not object if his appeal was within three months of the deadline, and that there had been an initial lack of funds.

12. The appeal was acknowledged by the Tribunal on 13 August 2021. The Respondents were directed to file and serve their Statement of Case no later than 12 October 2021.

13. On 11 October 2021, the Respondents applied for this appeal to be stayed until the Court of Appeal had handed down their judgment in (what was subsequently reported as) *HMRC v Kishore* [2021] EWCA Civ 1565. On 27 October 2021, the Appellant's agent responded to the application, stating that she would consider this with the Appellant and respond in the next 7-10 days. In the event there was no further response from the Appellant's agent as the Court of Appeal handed down their judgment on 28 October 2021.

14. No stay was directed. However, if the stay application had been allowed then, once the Court of Appeal released their judgment, the Respondents would have only one day left to file and serve their Statement of Case. That is on the basis that 59 of the 60 days for the Respondents to file and serve their Statement of Case had elapsed before the Respondents applied for a stay. Approximately five further five weeks passed before, on 3 December 2021, the Respondents filed and served their Statement of Case. No explanation for this delay was provided and no belated application was made for an extension of time. The Appellant's agent was copied in on the email sending this document to the Tribunal.

15. On 11 January 2022, the Appellant's agent notified the Tribunal that they were no longer acting for the Appellant.

16. On 14 January 2022, the Appellant filed his list of documents.

17. The Tribunal issued case management Directions on 17 February 2022. These Directions gave both parties until 1 April 2022 to file and serve their list of documents (despite the Appellant having already filed his list), and gave the Respondents until 29 April 2022 to file and serve statements from all the witnesses on whose evidence they would rely. The deadline for the Appellant to serve his witness evidence was 27 May 2022. Those directions anticipated that the substantive hearing of this appeal would take place in the hearing window of 15 August to 10 December 2022.

18. The next relevant step is that on 29 March 2022, the Respondents applied for the Directions to be varied so that there was no requirement to file a list of documents, that the deadline for their witness evidence was revised to 24 June 2022, and that all other deadlines were similarly extended by two months. The Respondents did not explain why they considered they required this extension of time. The Appellant was asked to provide the Tribunal with his observations on this application but he did not comment.

19. On 18 May 2022, Judge Cannan allowed the Respondents' application. The revised date for the Respondents to file their witness evidence was 24 June 2022, with the Appellant to serve his witness evidence by 29 July 2022.

20. On 23 June 2022, the Respondents sought a further extension of time, until 15 July 2022, to file and serve their witness evidence. On this occasion the Respondents explained that they needed more time to review the evidence and to consult with their counsel to finalise the evidence. The Appellant responded on 27 June 2022, questioning why further time should be required when the Respondents had "ample opportunity and resources to have had advice from counsel by now" and suggesting that if the further extension was to be granted then the other deadlines in the Directions should also be extended by 21 days.

21. On 29 June 2022, Judge Cannan granted the Respondents' application for more time, and extended the other deadlines by 21 days as the Appellant had requested.

22. The Respondents did not file their witness evidence by 5 p.m. on 15 July 2022.

23. On 28 July 2022, the Tribunal sent a chasing letter to the Respondents. On 29 July 2022, the Appellant emailed the Tribunal pointing out that the Respondents' evidence was now 14 days overdue, and asking that the Respondents not be permitted to file evidence and also that his appeal be allowed.

24. On 5 August 2022, the Respondents apologised to the Tribunal and the Appellant for their delay, which they said was due to the relevant lawyer having been ill between 12 and 24 July 2022, and the relevant witness then having been on "intermittent leave". The Respondents applied for a witness statement of Officer Whitehouse (and 846 pages of exhibits) to be admitted 21 days late. That statement was signed 29 July 2022. In detailed submissions, the Appellant opposed this application. The Appellant noted the previous delays and that Officer Whitehouse had filed a similar statement in ICL's appeal (before that appeal had been struck out) with only 5 new pages being provided in the 846 pages of exhibits provided with Officer Whitehouse's new statement. The Appellant argued that the Respondents had sufficient resources that a colleague could have covered for the relevant lawyer so that the deadline was not missed, and he concluded there was no good reason for the Respondents' delay.

25. Judge Cannan required the Respondents to respond to the Appellant's submissions by 29 August 2022.

26. On 30 August 2022 (due to 29 August 2022 being a bank holiday), the Respondents filed their response to the Appellant's objection. With the exception of three additional sentences, the Respondents' response was worded identically to their original application for the late witness statement to be admitted.

27. Meanwhile, on 18 August 2022, the Appellant had made an application, seeking further time for his witness evidence due to the Respondents' delay but also because it was taking time to obtain information relating to ICL as it was in liquidation. The Respondents had confirmed they did not object to the Appellant's application.

28. On 2 September 2022, Judge Cannan released a decision and further Directions. The Respondents were granted an extension until 5 August 2022 to file their evidence, and the Appellant was granted an extension until 28 October 2022 to file his evidence. In his accompanying decision, Judge Cannan described the Respondents' delay of 21 days as "at least bordering on what might be described as serious and significant" in the context of this appeal. That conclusion was reached because the Respondents' delay in filing their evidence meant that there would be a corresponding delay to the listing of a hearing date. At the conclusion of his decision, Judge Cannan warned the Respondents:

> … the circumstances of this breach will be taken into account in future case management of the appeal.

29. On 24 October 2022, the Appellant requested a further 30 days for his witness evidence. He had already sought the consent of the Respondents, and they had agreed. Judge Cannan extended the deadline for the Appellant's evidence to 28 November 2022, and also extended the deadline for both parties to provide their listing information to 2 December 2022.

30. On 28 November 2022 the Appellant served his witness evidence on the Respondents. On 2 December 2022, the Respondents sought a seven day extension to the deadline for them to file their listing information, on the basis that the relevant lawyer and counsel had both been in a hearing from 28 November to 1 December and had not had the opportunity to review the Appellant's evidence or discuss the likely hearing estimate. Judge Cannan extended the deadline for both parties to provide their listing information to 9 December 2022.

31. On 9 December 2022, the Respondents made the first of the applications to be considered in this decision, asking also that the remainder of the Directions be suspended pending determination of their application. This application is considered in more detail below but, in short, the Respondents sought permission to serve late serve seven witness statements that were said to have been served in the appeal of ICL but that the Respondents had omitted to file or serve within time in this appeal.

32. On 12 December 2022, the Appellant filed his listing information and opposed the Respondents' application to file evidence late.

33. On 15 December 2022, Judge Cannan directed that the Respondents' application would be listed for hearing. The Respondents were directed to prepare an electronic bundle, and also provide a summary of their submissions and any authorities relied upon, no later than 14 days before the hearing. The Appellant was directed to provide a summary of his submissions and any authorities he relied upon no later than seven days before the hearing.

34. On 11 January 2023, a hearing was listed for 6 April 2023. The deadline for the bundle, and the Respondents' submissions therefore was 23 March 2023, and the deadline for the Appellant's submissions was 30 March 2023. The parties were directed to agree a bundle if possible.

35. On 14 March 2023, the Appellant made the second of the applications to be considered in this decision, seeking disclosure from the Respondents of information and a document. This application was referred to me. On 17 March 2023, I notified the parties that the Appellant's application would be heard at the same time as the Respondents' application. I directed that written submissions in respect of the Appellant's application were not required but that any documents or submissions in respect of the Appellant's application that either party did wish to file must be filed and served by 31 March 2023.

36. On 30 March 2023, the Appellant filed his submissions in opposition to the Respondents application, as directed by Judge Cannan. No submissions in support of their application had been received from the Respondents on 23 March 2023, or at any time. Mr Carey told me at the hearing that the Respondents intended to rely upon their application as their written submissions but accepted the Respondents had not explained this to the Tribunal or the Appellant.

37. After 5 p.m. on Friday, 31 March 2023, the Respondents belatedly filed with the Tribunal (but did not serve on the Appellant) the bundle they would reply upon in support of their application. This bundle was 1,803 pages in length. At the same time, the Respondents made their second application (noted above), seeking permission for the admission of a (yet to be finalised) witness statement from HMRC Officer Stock to replace the witness statement made by HMRC Officer Daye. This application was made on the basis that Officer Daye had since retired and would not be available to give evidence at the hearing of this appeal.

38. On 5 April 2023, less than 24 hours before the hearing, the Appellant received the Respondents bundle for the hearing on 6 April 2023.

39. Having set out that chronology, I can now turn to the applications to be determined.

### THE RESPONDENTS' FIRST APPLICATION

40. The Respondents' first application was made on 9 December 2022. The application begins as follows:

> TAKE NOTICE that the Respondents HEREBY make an application for an order under Rule 15 of the Tribunal Procedure (First-tier Tribunal) Rules 2009 (''The Rules") that the Respondent is allowed to serve 7 Witness Statement previously served on the Appellant's former company [ICL] (In Liquidation) in the course of appeals .

41. As ICL's appeal was struck out on 26 November 2021, it follows that the witness statements to which the Respondents referred in that application must have been made before 26 November 2021, and also served before that date. The seven witness statements that the Respondents wish to have admitted are included in the bundle prepared by the Respondents for this hearing. The statement of Officer Daye is dated 3 September 2020, and this statement was filed and served in ICL's appeal. The remaining six statements are dated between 3 January and 29 March 2023, and so could not be statements that were served in ICL's appeal.

42. During the course of the hearing Mr Carey sought instructions and confirmed that the only changes in the six new statements were those necessary to remake the witness statement so that it was a statement in these proceedings. These were matters such as the header and date. I accept that explanation. That was not, and could not have been, apparent to the Appellant in the less than 24 hours he had to read and consider the bundle.

### THE TEST TO BE APPLIED

43. In considering whether to admit late evidence I consider the appropriate test to be applied is that set out by Judge Mosedale in paragraph 8 of *Masstech Corporation Limited v HMRC* [2011] UKFTT 649 where she stated:

> 8. The conclusions I draw from these cases and from general considerations of fair hearings are as follows:
>
> - Only relevant evidence should be admitted;
> - Such evidence should nevertheless be excluded where there is a compelling reason to do so;

- Whether there is a compelling reason to do so will be a balancing exercise the object of which is to achieve a trial that reaches the correct decision by a process fair to all parties;
- To conduct that balancing exercise the Tribunal must consider the likely probative value of the evidence, any unfair prejudice caused to either party, good case management and any other relevant factor.
- Unfair prejudice includes the factors listed by Lord Bingham which were particularly relevant in that case but in this case, not being a trial by jury, perhaps of less relevance. Unfair prejudice would include a party being ambushed so that it is strategically disadvantaged or put in a position that it has no time to bring evidence in rebuttal.
- Considerations of good case management will include the need for a sanction against a party which adduces late evidence particularly where the evidence could have been produced earlier; it will recognise the desirability of adhering to trial dates and avoiding unnecessary costs.

44. I agree that the seven witness statements are relevant to this appeal.

45. Therefore, those seven statements should only not be admitted if there is a compelling reason not to admit them. To decide whether there is a compelling reason I must conduct a balancing exercise, taking into account the "likely probative value of the evidence, any unfair prejudice caused to either party, good case management and any other relevant factor".

46. In considering this point, I weigh the prejudice to the Respondents, the prejudice to the Appellant, and good case management generally. I also consider the over-riding objective to act fairly and justly.

47. I consider first the prejudice to the Respondents. Mr Carey suggested it would be "likely catastrophic" to the Respondents case if the seven witness statements were not admitted. As the Appellant pointed out, that begged the question of why the Respondents had not taken more care prior to 15 July 2022 when reviewing their evidence and assessing what they would require. While Mr Carey did not commit the Respondents to the withdrawal of their defence of this appeal if the evidence was not admitted, I agree with the essence of Mr Carey's submissions which is that it would be exceptionally difficult for the Respondents to proceed with any confidence if they could rely only on the witness evidence of Officer Whitehouse and the documents exhibited to Officer Whitehouse's witness statement.

48. If the witness statements are to be admitted then there would be some prejudice to the Appellant but I agree with the Respondents that this would be more limited than the prejudice the Respondents would suffer if the statements were not admitted. In considering prejudice I contrast the position if the statements had been filed on time, and the likely position if the statements are admitted, so what I am considering is the effect that the delayed provision of the witness statements has had on the fairness of the proceedings. I consider that the main prejudice the Appellant would suffer would be the risk of yet further delay to the progress of this appeal, with the consequential emotional strain and financial cost that would cause. The Appellant has already endured a year of delay in this appeal due to the Respondents' failure to comply with Tribunal directions. Although the Appellant would face a longer hearing if the seven witness statements were admitted late (approximately ten days compared to the possible five days if the Respondents decided to proceed on the evidence of Officer Whitehouse alone), and it will also take slightly longer to list a longer hearing, the delay in filing the statements has not extended the likely length of the hearing. The Appellant would have faced a hearing of approximately ten days if the evidence had been admitted on time.

49. When considering good case management, I consider the following is relevant:

(a) The Appellant will not face material he has not seen before. Although this was not established until the course of the hearing, I accept that the content of the witness statements will be the same as they were in ICL's appeal. Although it is likely that the Appellant would take some time to refresh his memory of the statements' contents, he would not face completely new material. The original Directions contemplated that the Appellant would have the opportunity to adduce evidence in rebuttal, and I can issue Directions that give the Appellant that opportunity again if the seven late witness statements are admitted.

(b) The Respondents' application for admission of late evidence was made prior to the listing of this appeal. The admission of the seven statements would not result in the loss of a substantive hearing date. Although a hearing with seven additional witnesses will inevitably be longer and also take longer to list, that is the position the parties would have expected to be in had the directions been complied with on time.

(c) The delays here have not put the Appellant in a position where he cannot properly prepare his case. However, I am concerned that concerned that any further delay could put sufficient strain on the Appellant that there then would be a significant risk that he would not be able properly to prepare his case. It is sometimes easy for a large organisation such as the Respondents to overlook the difficulties and pressure that an unrepresented litigant faces in conducting litigation, especially when it is likely to be a lengthy hearing. Had there been medical evidence before me, I might have reached a different conclusion on this point.

(d) There has been a history of delay by the Respondents, of sufficient severity for Judge Cannan to have warned the Respondents about their failure to give this matter sufficient attention. If the Respondents had complied timeously with the original Tribunal deadlines in this appeal then it is most likely that the substantive hearing would have already taken place. Even allowing for all the previous delays, the Tribunal would have been in a position to list this appeal on 9 December 2022 had the Respondents not filed this application instead of providing their listing information. Most worryingly, even in their preparation for this application, an application in which they seek relief from the consequences of their earlier failures to give this appeal sufficient priority, the Respondents failed to comply on time with Tribunal Directions. That most recent failure had the consequence that the Appellant was only provided with a hearing bundle less than 24 hours before the hearing. However, in considering this application I consider I am required to take a forward view of likely events to see if a fair substantive hearing is still possible. Therefore, I take the view that the Respondents' compliance record is relevant only insofar as it causes me to have concern about the future progress of this appeal. If I have concerns about the Respondents likely future compliance with directions that will be imposed – and in this case I do have such concerns – then I am able to issue directions that carry sanctions if there is any further breach.

50. Finally, I consider the over-riding objective to deal with cases fairly and justly. I should ensure that the parties are, so far as possible, able to participate fully in the proceedings, while at the same time avoiding delay and dealing with the case in a way that is proportionate to the anticipated costs and resources of the parties.

51. I have reached the conclusion that the Respondents' application should be allowed. However, the directions to be issued will be backed by the sanction of an Unless Order, so that the Respondents will be barred automatically if they fail to comply with any of those directions. Mr Carey made a valiant but ultimately unsuccessful attempt to persuade me that a discretionary Unless Order would be more appropriate. I consider that the Respondents' approach to this appeal thus far suggests there has been considerable "oversight", and the

sanction of automatic barring is the only remedy that will ensure that the Respondents will focus their attention appropriately to give this matter the priority it merits.

**THE APPELLANT'S APPLICATION**

52. I now consider the Appellant's application for disclosure by the Respondents. There are three elements to this. The first two elements are requests for information, that could also be characterised as a request for clarification (or further and better particulars) of the Respondents case; the third element is a request for a document.

53. Rule 16 of the Tribunal Rules provides:

> 16. –(1) On the application of a party or on its own initiative, the Tribunal may-
>
> > (a) by summons (or, in Scotland, citation) require any person to attend as a witness at a hearing at the time and place specified in the summons or citation;
> >
> > (b) order any person to answer any questions or produce any documents in that person's possession or control which relate to any issue in the proceedings.

54. The Tribunal has the power to order a person (including the Respondents or an officer of the Respondents) to answer questions or produce any documents they have in their possession or power but the applicant, in this case the Appellant, must demonstrate that the proposed questions or document are relevant to an issue in the proceedings. So, I must decide first whether what is sought is relevant and, if it is, then I must then decide whether it is appropriate to order its provision.

55. The first element sought by the Appellant is further information about how the penalty issued to ICL has been calculated and whether a repayment due to ICL for a later period has been taken into account. The Appellant's request is worded as:

> ICL submitted a final VAT return for the three months up to the VAT cancellation date. In this period of time [ICL] were not using any of the missing trader and therefore should not have their input tax deducted for this period. Unfortunately I currently do not have access to the VAT return however it was a rebate of circa £35,000. This was never paid to [ICL]. The fine should have the rebate for this period January - March 2020 subtracted from it. I request that HMRC produce this paperwork and explain why this has not happen and revise the fine to reflect the VAT rebate.

56. The Respondents Statement of Case does not explain precisely how the penalty was calculated. I agree with the Appellant that the calculation of the penalty issued to ICL is relevant to these proceedings. I have also decided that it is appropriate that this information should be provided to the Appellant. At the hearing the Respondents accepted that the way in which the penalty had been calculated was relevant and should be explained. Mr Carey suggested, helpfully, that this calculation could be by way of a witness statement from the relevant officer, in order that the Appellant could question the officer, if necessary, at a substantive hearing. I agree that would be sensible.

57. The second element is the Appellant's request for clarification of what is meant by "end user" and how that affects the calculation of the penalty issued to ICL. The Appellant requested:

> In the respondents statement of case (see attached) they state in point 56.
>
> "The customers who use [ICL] services are private individuals, for example people who contracted them to complete domestic renovations, and are not VAT registered. [ICL] was therefore the 'end user' in the labour chain."

> This statement is not correct. In fact a large percentage of the turnover at the time was relating to a development where the 'end user' was a property developer with their own VAT number. Can HMRC confirm and explain who the 'end user' is in a construction chain with a property developer. Statement 56 implies that the 'end user' in a scenario where the customer has a VAT number such as in the case of a property developer would be the customer and not the construction company.

58. I agree with the Appellant that if there is a lack of clarity in the Respondents Statement of Case, he is entitled to have the Respondents case better explained so that the Respondents position is clear to him. I do not understand the Respondents to disagree with that contention. Indeed, on 13 April 2023, and shortly before this Decision was due to be released, the Respondents filed a Second witness statement of Officer Whitehouse, addressing both of the elements above raised by the Appellant.

59. The third element is the Appellant's request for a report by the Insolvency Service following the insolvency of ICL. As the Appellant explained at the hearing, the Insolvency Service had investigated his conduct and the conduct of his fellow director. The Appellant explained:

> HMRC has the ability to obtain the results of the insolvency investigation into the co-director [Mr M]. This document I feel is very likely to collaborate my picture of events and further highlight that [Mr M] operated without any regard for the business and was completely autonomous in his actions.

60. In a follow up email sent to the Tribunal on 6 April 2023, after the hearing had concluded, the Appellant forwarded an email chain between himself and the Insolvency Service. In that email chain the Insolvency Service confirmed that no Directors Disqualification proceedings would be taken against the Appellant, but that the Insolvency Service could not yet tell the Appellant what the position was with regard to his fellow director. The relevant parts of the email chain, from July 2022 is:

> *The Appellant*: I was hoping to find out if [Mr M] is going to be disqualified or not. Part of my case is to show that [Mr M] has acted in an unscrupulous manor in a number of areas of the business and that they have wrongly fined me for his actions. Are you able to let me know if you are proceeding against him?
>
> *The Insolvency Service response:* Unfortunately, at this stage, I am unable to disclose whether disqualification proceedings against [Mr M] is taking place, however, if you ask HMRC to contact us directly to request the information, we should be able to share the information they need via the appropriate channels.

61. At the hearing the Respondents were unable to confirm whether the Insolvency Service's report on Mr M was in their possession. The Respondents position was that they resisted disclosure of this document (if they did hold it) on the grounds that it was not relevant to an issue in the proceedings.

62. The onus is on the Appellant to show that this report is relevant to these proceedings. The Appellant's third and fourth grounds of appeal are set out above. The Appellant explained that the argument he wished to make was that Mr M was wholly responsible for the 60 transactions the Respondents considered to be connected to fraudulent evasion, and he was not involved at all, and so it was wrong for the Respondents to make him personally liable for 50% of ICL's penalty. The Appellant argued that the report by the Insolvency Service was relevant because it would (he hoped) show that Mr M was culpable; the Appellant believed

the report would provide independent support for his argument that Mr M had side-stepped protocols, ignored him and so no liability for ICL's penalty should be attributed to him.

63. In response Mr Carey reminded me that deliberate wrongdoing would need to be pleaded very clearly and had not been pleaded here but, if the Appellant was suggesting that Mr M's behaviour amount to a fraud on ICL, then he referred me to *Sandham t/a Premier Metals Leeds v HMRC* [2020] UKUT 193.

64. In *Premier Metals*, an appeal involving the Respondents' denial of input tax on the basis of *Kittel*, a partnership had acted though an agent. The First-tier Tribunal found that the agent knew that the relevant transactions were connected with fraud but that, although the two partners had been careless in that they did not ask basic questions about the way the agent was acting, neither of the two partners had the means of knowing that the transactions were connected to fraud. The First-tier Tribunal decided that the knowledge of the agent should nevertheless be attributed to the partnership with the consequence that the partners should be taken as knowing the transactions were connected to fraud. On appeal, the Upper Tribunal accepted that the partners had been deceived by the agent but held that, in the context of *Kittel* and where the partners relied on the agent's actions to claim the disputed input tax, the partners were still to be attributed with the knowledge of the agent in respect of the relevant transactions. The Upper Tribunal decision in *Premier Metals* is binding on me and will be binding on the tribunal panel that hears the substantive hearing of this appeal.

65. The issue for me to decide is whether material which may show that the Appellant's co-director acted in a particular way in respect of the relevant transactions, is relevant to the issues to be determined by the Tribunal in this appeal. I take "relate to any issue" to mean that the material could affect or impact upon the decision the Tribunal makes in respect of that issue. While I appreciate why the Appellant is keen to demonstrate that Mr M acted in the way he believes will be described in the Insolvency Service report, I agree with the Respondents that the Insolvency Service report on Mr M is not relevant to the issues that the Tribunal will have to decide in these proceedings. Even if the Appellant were to show that Mr M's side-stepping of protocols amounted to a fraud on ICL and/or him, the Appellant would also be relying upon the claim to input tax made on behalf of ICL by Mr M. In these circumstances, following *Premier Metals*, the Appellant would still have the knowledge of Mr M attributed to him in proceedings brought against the Respondents.

66. As the document does not relate to an issue in the proceedings I do not need to go on to decide whether it is in the "possession or control" of the Respondents, or whether it would be appropriate to order its disclosure in these proceedings. Therefore, I dismiss the Appellant's application in respect of the third element.

### CONCLUSION

67. For the reasons set out above, I have decided that:

- The Respondents application is allowed but it is appropriate to attach an Unless Order to future Directions to ensure the Respondents' compliance with deadlines, and
- The Appellant's application is allowed in respect of the requests for information but dismissed in respect of the request for disclosure of a document.

68. Directions are issued to provide for the determination of the Respondents' additional application, and for the progress of this appeal to substantive hearing.

### RIGHT TO APPLY FOR PERMISSION TO APPEAL

69. 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.

**JANE BAILEY**
**TRIBUNAL JUDGE**
**Release date: 24th APRIL 2023**