[2014] UKUT 0329 (TCC)

Appeal numbers: FTC/62/2014
FTC/82/2014

PROCEDURE — MTIC appeal — application to strike out part of appellant's case — evidence served by respondents but no contrary evidence served by appellant — appellant requiring respondents to prove their case but advancing no positive case of its own — First-tier Tribunal refusing to strike out — whether jurisdiction to strike out — yes — whether discretion reasonably exercised — yes — guidance to FTT offered

UPPER TRIBUNAL
TAX AND CHANCERY CHAMBER

THE COMMISSIONERS FOR HER MAJESTY'S REVENUE AND CUSTOMS
Appellants and respondents to the cross-appeal

- and –

FAIRFORD GROUP plc (in liquidation)
FAIRFORD PARTNERSHIP LIMITED (in liquidation)
Respondents and appellants in the cross-appeal

Tribunal: The Hon Mr Justice Simon
Judge Colin Bishopp

Sitting in public in London on 1 July 2014

Howard Watkinson, counsel, instructed by the General Counsel and Solicitor to HM Revenue and Customs, for the appellants and respondents to the cross-appeal

James Pickup QC and Simon Gurney, counsel, instructed by Bark & Co, for the respondents and appellants in the cross-appeal

DECISION

Background

1. This is the hearing of two appeals arising from the decision of Judge John Brooks in the First-tier Tribunal (Tax Chamber) ('FTT'): an appeal of the Commissioners for Her Majesty's Revenue and Customs ('HMRC') and a cross-appeal of the two Respondents ('the Taxpayers').

2. The appeals raise issues as to the jurisdiction of the FTT to strike out the whole or a part of an appellant's case, and whether such powers should have been exercised in the present case.

3. On 1 April 2014, the FTT decided that it had jurisdiction under Rule 8(3)(c) of the First-tier Tribunal (Tax Chamber) Rules 2009 ('the FTT Rules') to strike out part of the Taxpayers' appeal, but that it should not exercise that power on the facts of the case. The Taxpayers challenge the first part of this decision and HMRC challenge the second part. Each appeal is brought with the permission of the FTT.

The hearings before the FTT

4. The Taxpayers' appeals, directed by the FTT to be heard together, are against HMRC's decision to deny input tax deduction for the VAT periods 03/06 and 06/06 on the basis that the Taxpayers' transactions were connected with the fraudulent evasion of VAT and that they knew, or should have known, of the connection.

5. The alleged connection forming the basis of HMRC's decision is with a Missing Trader Intra-Community ('MTIC') fraud. The fraud in this case is said to involve both the 'vanilla' version, where transactions carried out by the Taxpayers can be traced directly to a fraudulent tax loss, and the 'contra-trading' version, where the transactions carried out by the Taxpayers can be traced through a 'clean' chain to a trader involved in covering up the tax losses of fraudulent defaulting traders in an apparently distinct but in reality linked 'dirty' chain. The appeals relate to 36 transactions, and more than £13 million of input tax.

6. On 21 and 29 August 2008 the Taxpayers served Notices of Appeal challenging HMRC's decisions to deny input tax deduction for the VAT periods 03/06 and 06/06 respectively. It is unnecessary to refer further to the grounds advanced as they have been overtaken by events.

7. In *Blue Sphere Global Ltd v HMRC* [2009] EWHC 1150 (Ch), Sir Andrew Morritt C identified at [29] the four questions which the FTT must consider and answer in such cases.

(1) Was there a VAT loss?

(2) If so, did this loss result from a fraudulent evasion?

(3) If there was a fraudulent evasion, was the appellant's transaction that is the subject of the appeal connected with that evasion?

(4) If such a connection was established, did the appellant know, or should it have known, that its purchases were connected with a fraudulent evasion of VAT?

8. In *Mobilx v HMRC* [2010] EWCA Civ 517 [2010] STC 1436 the Court of Appeal, having agreed with this analysis, made clear at [81] that in MTIC appeals the burden of proving all four elements of the *Blue Sphere Global* test rests on HMRC.

9. In *Red 12 Trading Ltd v HMRC* [2009] EWHC 2563 (Ch) [2010] STC 589 at [84] Christopher Clarke J gave further guidance as to what HMRC needed to prove:

> '…What is needed for an MTIC fraud to work is an importation without payment of VAT, a trader who disappears without accounting to HMRC for the output tax it has received, and an export which generates an entitlement to claim back input tax. The original importer will make the most profit from failing to pay over output VAT. For that reason the defaulter is usually the original importer; but any company in the chain which defaults at any stage in the chain will make a profit from not accounting for the VAT, assuming that it has sold on at a profit. In order to justify denial of the right to deduct input tax there must be knowing participation in a transaction connected with fraudulent evasion of the tax. If that is established, the right is lost. It would be inconsistent with that principle, and an unmerited boon to fraudsters, to require the authorities to prove that the defaulter was the original importer…'

10. HMRC's case, as set out in its Statements of Case, is that the Taxpayers' transactions, and the other associated chains of transactions, were orchestrated as part of overall schemes to defraud the Revenue. Its primary case is that the Taxpayers had actual knowledge that their transactions were connected with fraud. In the alternative, HMRC's case is that the Taxpayers should have known that their transactions were connected with the fraudulent evasion of VAT.

11. There were considerable delays in bringing on the Taxpayer's appeal and a hearing was finally fixed for 25 days from 10 March 2014. By this stage HMRC had served witness statements and exhibits in relation to the 16 traders who, they allege, were either fraudulent defaulting traders or traders whose VAT registration numbers had been hi-jacked by fraudsters to occasion fraudulent VAT defaults.

12. There was an application to adjourn the hearing of the appeal due to the ill health of Mr Bassi, a director of both Taxpayers; and on 13 February 2014 HMRC applied to strike out part of the Taxpayers' case on the basis that there was no reasonable prospect of their succeeding in showing that (1) defaulting and hijacked traders did not occasion tax losses and (2) the tax losses were not occasioned by fraud. Two points may be noted. First, the burden of proving those two matters remained with HMRC throughout; and secondly, the intent of HMRC was to focus the Taxpayers' attention on the first two of the *Blue Sphere* questions.

13. HMRC's application noted that it had served witness statements demonstrating the chains that connected the Taxpayers' transactions to those of the defaulting or hijacked traders, in some cases directly and in others via four identified contra-traders.

14. Although HMRC had taken the opportunity of the Taxpayers' application to adjourn the hearing to make its own application to strike out, there had been earlier correspondence in which HMRC had sought to identify the real issues between the parties in the appeals.

15. On 1 December 2011 HMRC wrote to Bark & Co (the solicitors representing the Taxpayers) noting that they had had the bulk of HMRC's evidence for approximately 7 months. On the issue of the (then 15 day) estimate they pointed out:

> 'The estimate can be further reduced if the [Taxpayers] indicate which tax losses (or which aspect of the tax losses) are not accepted. We cannot, on the face of it, understand why the [Taxpayers] will need a quarter of a day with each defaulter officer. On the [Taxpayers'] own case, these entities are removed from them by several steps. What is it that they need to put to the witnesses that can possibly take so long? The [Taxpayers] can invite the tribunal in due course to conclude that the tax loss is not proved. To this end we enclose a summary of the tax losses, please indicated what is not accepted.'

16. We would note that the questions which were asked on 1 December 2011 remained unanswered at the conclusion of the hearing before us. On the face of it 14 different employees of HMRC are required to be called in relation to 16 traders to prove matters in respect of which there is no identified issue.

17. The letter continued:

> 'We put you on notice that if you do not respond constructively and substantively to this invitation and in the fullness of time it transpires that the [Taxpayers] do agree the tax loss/connection evidence, then [HMRC] will seek indemnity costs for the time we and counsel are forced to spend preparing these issues for trial.'

18. Bark & Co's response was to contend that HMRC was attempting to bully them into conceding the issue of tax loss and its being caused by fraudulent evasion.

19. The Taxpayers' application to adjourn the hearing and HMRC's application to strike out part of the Taxpayers' case were heard by Judge Mosedale on 14 February 2014. She adjourned the hearing on terms and made directions in relation to HMRC's application so as to ensure that it could be heard by the FTT with a 2-day estimate starting on 17 March 2014. The taxpayers were ordered to serve reasoned objections to the strike-out application by 3 March, and HMRC were ordered to serve a response by 10 March.

The FTT's case-management powers

20. Before turning to the hearing before Judge Brooks it is convenient to set out some of the FTT's case-management powers under the FTT Rules.

> **Overriding objective and parties' obligation to co-operate with the Tribunal**
>
> **2.** (1) The overriding objective of these Rules is to enable the Tribunal to deal with cases fairly and justly.

(2) Dealing with a case fairly and justly includes—

(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 ...

(4) Parties must—

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

(b) co-operate with the Tribunal generally.

Case management powers

5. (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–

...

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

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

...

(g) decide the form of any hearing.

Striking out a party's case

8. (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.

Evidence and submissions

15. (1) Without restriction on the general powers in rule 5(1) and (2) (case management powers), the Tribunal may give directions as to—

(a) issues on which it requires evidence or submissions;

(b) the nature of the evidence or submissions it requires;

...

21. It is clear that the FTT Rules provide a wide variety of forensic tools which can be deployed so as to give effect to the overriding objective which includes dealing with the case proportionately in the light of its importance, the complexity of the issues and the anticipated costs.

The decision of the FTT

22. As already noted there were two issues before the FTT. The first issue was whether the FTT had the power under Rule 8(3)(c) of the FTT Rules to strike out that

part of each Taxpayer's appeal in which it put in issue (1) whether there was a VAT loss; and (2) if so, whether the loss resulted from a fraudulent evasion. HMRC's argument was that, in the light of the evidence which they had served, there was no real issue on either of these points in relation to any of the 16 traders. The Taxpayers argued that there was no power to strike out their case where HMRC bore the burden of proof. The second issue was whether, it being accepted by both sides that the power under Rule 8(3)(c) was discretionary, the Judge should exercise his discretion to strike out the parts of the Taxpayers' case which put the two questions in issue.

23. At the conclusion of the hearing Judge Brooks found (1) that the FTT had jurisdiction to strike out the relevant parts of the Taxpayers' cases (§13 of the decision); but (2) he could not conclude that the Taxpayers had no reasonable prospect of challenging HMRC's evidence without a detailed examination of that evidence. It followed that the issues of tax loss and the fraudulent nature thereof were not appropriate for determination in such an application (§24 of the decision). Each side was given permission to appeal.

24. The Taxpayers have made it clear that they require all of HMRC's witnesses to attend for cross-examination and the hearing, fixed for early 2015, remains an estimated 5 week hearing.

The issues on the appeal

25. Three issues arise:

(1) What is the Upper Tribunal's appellate jurisdiction in relation to these appeals?

(2) Was the FTT wrong to conclude that it had jurisdiction to strike out the relevant parts of the Taxpayers' case?

(3) If, as the FTT found, it did have jurisdiction, was its approach to the strike out application wrong in law?

Issue 1

26. For the Taxpayers Mr Pickup QC submitted that the jurisdiction of the Upper Tribunal in relation to an appeal on what he characterised as an interlocutory case management decision was strictly confined. The Upper Tribunal should not conduct a re-hearing of the application and reach its own decision on whether to order a strike out or order the hearing of a preliminary issue. It should not interfere with the decision unless it concluded that the FTT's decision was plainly wrong or, to the extent that it was exercising its discretion, it did so unreasonably or not in a judicial way.

27. For HMRC, Mr Watkinson submitted that it was too easy to characterise the FTT decisions as case-management decisions. It was common ground that the strike-out application was a novel one, a factor to which Judge Brooks himself referred when granting permission to appeal. The FTT did not in fact embark on any fact-finding exercise, nor did it exercise its discretion. Since the issues were acknowledged to give rise to novel points, the FTT was more susceptible to error. He

also relied on what was said about the supervisory function of the Upper Tribunal as described by Lord Carnwath JSC in *R (Jones) v First-tier Tribunal (Social Entitlement Chamber)* [2013] 2 AC 48 at [41]-[46], and the need for the Upper Tribunal to interpret appeals on 'points of law' flexibly. He submitted that the Upper Tribunal should not find itself confined to the narrowly circumscribed jurisdiction advanced by the Taxpayers but should be prepared to review the FTT decision on the basis that matters of law were raised; and, if we deemed it appropriate, we should set down guidance for the determination of any similar applications that may be made in the future. If necessary he invited us to conclude that the decision on the second point was perverse.

28. This is a threshold issue. The right to appeal derives from s 11 of the Tribunals, Courts and Enforcement Act 2007, and is confined to a point of law. The Upper Tribunal should only interfere if it concludes that a decision is wrong in law or, to the extent that the FTT exercised a discretion, in doing so it failed to act reasonably and in a judicial way, see *Mobile Export 365 Ltd and another v HMRC* [2009] EWHC 797 (Ch) [2007] STC 1794 Sir Andrew Park at [13] and *CCE v Young* [1993] STC 394 at 397, Richards J. The FTT is conferred with a broad discretion in making case management decisions and this impacts on the degree of critical scrutiny which the Upper Tribunal will bring to bear. We are not persuaded that what Lord Carnwath said in *Jones* (in which the meaning of a phrase used in a statutory scheme was in issue) has any relevance to the function of the Upper Tribunal in an appeal against case management directions.

Issue 2

29. Mr Pickup accepted that, on a literal reading, Rule 8(3)(c) permitted an application to strike out part of the Taxpayer's case but submitted that the power cannot arise where there is no case being advanced and the Taxpayer is simply putting HMRC to proof. In short it can only apply to cases where the appellant to proceedings bears the burden of proof.

30. We do not agree. The FTT has the power to strike out a part of the proceedings if it concludes that there is no reasonable prospect of all or part of an appellant's case succeeding. A party's case is not confined to its positive case, nor to a form of pleading. Although Rule 8(3)(c) is in different terms, the parties (rightly in our view) accepted that CPR Part 3.4, which applies to the formal statements of case which are served in civil proceedings, was a helpful source of guidance on the proper application of Rule 8(3)(c). CPR Part 3.4(2)(a) confers a power to strike out a statement of case, including a defence, even where the burden of proof is on the Claimant; and it would be surprising if it were otherwise. The Court's powers may be exercised if a defence is vague, evasive, incoherent or obviously ill-founded, although in such cases the objectionable nature of the party's case can often be cured by amendment or further particulars.

31. It follows that in our judgment the Judge had jurisdiction under Rule 8(3)(c). We turn then to HMRC's criticism that he erred in not striking out the part of the proceedings he was invited to strike out.

Issue 3

32. The Judge considered two authorities on the power to strike out under CPR Part 3.4: *S v Gloucestershire County Council* [2001] Fam 313 (CA) and *Three Rivers District Council v Governor and Company of the Bank of England (No 3)* [2003] 2 AC 1 (HL).

33. He recorded HMRC's submission that all of the substantial facts relating to the tax loss and its fraudulent nature (and in deal 2, the Taxpayer's connection with the fraudulent evasion of VAT) had been disclosed and that 'as the evidence of this was overwhelming there is no prospect of [the Taxpayers] successfully disputing these facts or oral evidence affecting the [FTT's] assessment of them.' He also recorded Mr Pickup's submission that HMRC's evidence in relation to loss and fraud were still disputed and his acceptance that 'once the evidence had been tested by cross-examination it may be the case that these elements had been proved, but that it was necessary that the evidence be tested before such a conclusion could be drawn.' (We leave out of account a subsidiary point relating to connection in respect of one chain, a point on which we were not addressed separately.)

34. At [24] Judge Brooks expressed his conclusion on the merits of HMRC's strike out application.

> 'In my judgment this case does not fall within the circumstances envisaged by May LJ in *S v Gloucestershire County Council* as it would not be possible to ascertain whether the stance taken by the [Taxpayers] is 'unreasonable' in, as Mr Watkinson submits, the 'teeth of the evidence' served by HMRC and conclude that the [Taxpayers] have no real prospect of challenging that evidence or of it affecting the Tribunal's assessment of the facts without a detailed examination of that evidence.'

35. He continued.

> 'Given the burden of proof is on HMRC in an MTIC appeal and that the [Taxpayers] do not accept that the evidence served by HMRC establishes either a tax loss or that it resulted from fraudulent evasion and, in the case of deal 2, that the transaction which is the subject of the appeal was connected to the fraudulent evasion, it seems to me, having as I must regard to the overriding objective, that these are matters to be investigated at the substantive hearing and are not appropriate for determination in an application such as this.'

36. Accordingly he dismissed HMRC's application.

37. Mr Watkinson submitted that the Judge was not entitled to come to these conclusions, whether viewed as conclusions of mixed fact and law or as the exercise of discretion. He characterised the conclusions as perverse. First, because the FTT had not reviewed the evidence upon which the application was based (the fact that it was difficult was not a sufficient reason for refraining from such a review), and

secondly because the Judge had not heard (let alone considered) submissions as to how the analysis of the evidence should bear on his judgment of the strike-out application.

38. In the course of his submissions Mr Watkinson referred to §59 of the Taxpayers' objections to HMRC's strike-out application filed in compliance with Judge Mosedale's order of 18 February 2014. The defaulting creditor was Isales London Limited. So far as material, the Taxpayer's response was as follows:

> '[HMRC has] provided the deal documents in respect of the purchase and supply made by Isales in respect of the relevant deals which support the assessment issued on 12 September 2006. It is accepted, in respect of Isales, that there is evidence to support [HMRC's] assertion of 'a fraudulent tax loss', however the [Taxpayers] put [HMRC] to proof of the extent of that loss and its connection with the [Taxpayer's] transactions.'

39. Mr Watkinson submitted that this was an impermissible approach. All the evidence in support of the issues arising in relation to questions 1 and 2 as posed in the *Blue Sphere* case had been served. The evidence was accepted to be outside the Taxpayers' knowledge. They had an opportunity to indicate whether they accepted the evidence, and their only response was to require HMRC to prove the extent of the loss.

40. Mr Pickup was able to point to other examples where a more responsive approach was adopted, but maintained that the Taxpayer was entitled not to advance any positive case while requiring HMRC to prove the matters set out in the witness statements. We will return later to our views on this approach.

41. 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 (whilst recognising that there is no equivalent jurisdiction in the First-tier Tribunal Rules to summary judgment under Part 24). 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* (see above) 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.

42. While we might not have approached the application in the same way as the FTT we do not accept that either in his analysis or in his conclusion the Judge erred in law or in the exercise of his discretion. He did not go into the detailed analysis of each transaction because he was invited to deal with the matter as a question of principle. Although Mr Watkinson illustrated HMRC's complaint about how the Taxpayers have approached their appeal by reference to the example of Isales he did

not take us to the evidence in relation to each trader and the Taxpayers' approach to HMRC's evidence was not the same in relation to each trader.

43. Accordingly we dismiss HMRC's appeal on issue 3.

Case management

44. Although we have concluded that the appeal on the application of Rule 8(3)(c) in the present case fails, the case raises an important issue about case management. At an earlier stage in the proceedings those advising the Taxpayers indicated that they might require half a day to cross-examine each of the 14 HMRC witnesses as to their evidence that there was a tax loss and that it resulted from a fraudulent evasion. Bearing in mind that the Taxpayers were claiming that they had no knowledge of any fraud by the traders it is difficult to see how such an estimate could properly have been given.

45. In the course of his submissions Mr Pickup adopted a different approach. He submitted that it might be necessary to cross-examine in order to highlight various matters in the evidence. We do not accept that this is a good reason to cross-examine in the FTT, where the Tribunal will have already read the evidence. To require a witness to attend in order to repeat uncontroversial matters in a witness statement is not consonant with the overriding objective. Mr Pickup also revised the time he might need with the 14 witnesses, suggesting that it might be quite short, or he might not require them at all. He suggested that these questions could be left to the judgment of litigators who would, when they had reviewed the evidence at the time of the full hearing, let HMRC know whether a particular witness was required to give oral evidence, following a similar practice in the Crown Court. We do not accept that this is a satisfactory suggestion.

46. In a letter of 20 September 2012, HMRC wrote to Bark & Co asking (1) what issues they considered to be in dispute, (2) what witnesses they wished to cross-examine, and (3) the time estimate for the length of the matter. On 9 October Bark & Co replied (1) all issues remained in dispute, (2) they required all witnesses to attend to give evidence, and (3) the time estimate was 25 days. Again, we do not consider such an approach to hearings in the FTT to be consonant with the parties' obligations under Rule 2 of the FTT Rules.

47. A typical example of the form of directions used by the FTT in this type of case is as follows:

> The Appellant shall notify the Respondents and the Tribunal of the issues in dispute in this appeal by no later than [DATE] and in particular shall confirm whether it disputes:
>
> - Whether the Appellant accepts the transaction chains as set out in the deal sheets produced by HMRC in relation to the Appellant's purchases on which HMRC have denied input tax recovery accurately reflect the trading history of the goods bought and sold by the Appellant. If the Appellant does not accept the accuracy of the deal sheets, the Appellant should specify which chains it considers incorrect and why;

- Whether the Appellant accepts (without making any admission of knowledge or means of knowledge) that the Appellant's transactions were part of an orchestrated fraud;
- Whether, in respect of chains alleged to be directly connected with a defaulter, the Appellant accepts that there has been a fraudulent VAT default at the start of the chain;
- Whether, in respect of chains where the alleged connection to an alleged default is via an alleged contra-trader, the Appellant accepts its transactions were connected to fraudulent tax loss.

48. In our view the appellant should additionally be required to provide reasons if the answer to any of the second, third and fourth of those questions is no. An appellant who advances a positive case will be required, by virtue of other customary directions, to set it out in witness statements or, if that is not practicable, in a response or a letter, or in some similar way. Accordingly, an appellant putting a positive case must disclose his hand in advance; we see no reason why one merely putting HMRC to proof should be in a better position. If there is a real challenge to HMRC's evidence it should be identified; if there is not, the evidence should be accepted. We see no reason why an appellant who does not advance a positive case should be entitled to require HMRC to produce witnesses for cross-examination when their evidence is not seriously disputed. Such a course is wasteful not only of HMRC's resources but also of the resources of the FTT, since it increases the length of hearings and adds to the delays experienced by other tribunal users.

49. In our view the FTT should also direct that if an appellant raises no positive case, serves no evidence challenging the evidence of HMRC's witnesses, and does not identify the respects in which the statements of those of HMRC's witnesses who deal only with the questions set out at para 47 above are disputed, then their evidence can be given, and will be accepted by the tribunal, in the form of a written statement under FTT Rule 15(1) (see also Rule 5(3)(f)), and that cross-examination of that witness will not be permitted.

50. In our view this is both a practical and legitimate procedure for dealing with this type of issue.

Hon Mr Justice Simon

Judge Colin Bishopp

Released 23 July 2014