



**TC00542**

**Appeal number LON/2008/1277**

*Procedure – application to admit witness statement – expert evidence – relevance – duplication - no compelling reasons why statement should not be admitted – application allowed*

**FIRST-TIER TRIBUNAL**

**TAX**

**SCEPTRE SERVICES LIMITED**

**Appellant**

**- and -**

**THE COMMISSIONERS FOR HER MAJESTY'S  
REVENUE AND CUSTOMS (VAT)**

**Respondents**

**TRIBUNAL: ROGER BERNER (Judge)**

**Sitting in public in London on 6 August 2009**

**Mr N Popplewell, Solicitor, Burges Salmon, for the Appellant**

**Mr D Margolin, Counsel, instructed by the General Counsel and Solicitor to HM Revenue and Customs for the Respondents**

## DECISION

1. By Notice of Application dated 30 July 2009 the Respondents applied for permission to serve a witness statement of Dr Kevin W J Findlay pursuant to rule 5(1) and/or (3) and/or rule 15(1) and/or (2) of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009 (“the Rules”).

2. The grounds for the Respondents’ application are stated thus:

“The Commissioners’ grounds are that they wish to adduce evidence in answer to the evidence given by Mr Rayer in paragraphs 36 to 47 of his witness statement dated 26 September 2008 as to the nature of the business in which the Appellant has been involved and to adduce further evidence concerning 2 products (the Astra Semiconductor ADC and Astra Semiconductor ASI) in which the Appellant traded during the relevant VAT periods.

It is the Commissioners’ case that such evidence is relevant to matters in issue within the consolidated appeal and is likely to be of assistance to the Tribunal.

Insofar as, contrary to the Commissioners’ primary case, the evidence given in Dr Findlay’s witness statement is or contains expert evidence, the Commissioners seek permission to adduce such evidence pursuant to rule 5(1) and/or (3) and/or rule 15(1) and/or (2) of the Rules.

No final hearing date has yet been set in this case. It is to be presumed that evidence which is relevant and is likely to assist the Tribunal should be admitted in the absence of a compelling reason to the contrary.

The Commissioners accept that the Appellant should be afforded an appropriate period of time to reply to Mr (sic) Findlay’s evidence, if so advised.”

3. The application came before me at a pre-trial review on 6 August 2009. I gave directions for the future conduct of the appeal generally at that hearing, but reserved my decision on the Respondents’ application.

4. Mr N Popplewell, Solicitor, of Burges Salmon appeared for the Appellant and the Respondents were represented by Mr D Margolin of Counsel.

### **Background**

5. The appeal is one of those arising out of investigations by HMRC into Missing Trader Intra Community fraud (“MTIC fraud”), which I need not describe in detail for the purpose of this decision. The disputed decisions of HMRC deny the right of the appellant to deduct input tax in respect of VAT accounting periods 07/06 and 08/06. In outline, the Respondents say that in respect of nine deals in period 07/06 and eight deals in period 08/06 they have traced the chains of transactions to defaulting traders,

that the transactions were connected with fraudulent evasion of VAT and that the Appellant knew or should have known of that fact.

**Dr Findlay’s witness statement**

5 6. The witness statement of Dr Findlay is a substantial document running to 98 pages of text and 10 appendices. Its total length is 128 pages. There are in addition 47 exhibits referred to in the statement, though I did not see these.

7. Dr Findlay is an independent consultant advising PricewaterhouseCoopers LLP (“PwC”) and other firms on electronics, semiconductors, IT and software markets and technologies. His witness statement states that PwC have been engaged to provide expert witness evidence on the electronic components market.

8. In his witness statement Dr Findlay:

(1) sets out the typical distribution channels for the authorised electronic components market (the “white market”);

15 (2) explains the reason for and describes the legitimate electronic components grey market; and

(3) considers 14 transactions for which input VAT is being claimed by the Appellant and comments on whether the transactions are reasonable in terms of normal business practice in the electronics components industry in 2006.

20 9. Dr Findlay specifically addresses four components that were the subject of transactions involving the Appellant in one or both of the VAT accounting periods in question. These are:

Astra ADC ADC500A819 (“Astra ADC”)

Astra semiconductor ASI124775-BGA (“Astra ASI”)

25 Intel Pentium 4 630 775 slot Retail Boxed (“Intel P4”)

Maxtor Diamond Max10 8GB Hard disk drive 6L080L0 (“Maxtor 80GB”)

**Respondents’ evidence already filed**

30 10. The Respondents have already served a number of witness statements on the Appellant. I need to refer briefly to two of those statements.

*Mr Coughlin*

35 11. Allan Coughlin is employed in the School of Engineering at Cardiff University. His area of expertise is in electronic engineering. His witness statement considers two of the components concerned in the relevant transactions, namely the Astra ADC and the Astra ASI. As regards each of these he comments on the technical specifications

set out in invoices, as well as brochures and photo images said to relate to Astra Semiconductors, with a view to assessing their credibility. In relation to the Astra ADC, Mr Coughlin offers a comment on price, but in a generalised way, and subject to needing to clarify if the component is a bespoke device. Apart from this reference  
5 to price, Mr Coughlin's evidence does not address the components from a market perspective. His statement focuses on a technical analysis of the products and the background materials.

*Mr Stone*

12. Roderick Stone is employed by HMRC. In his witness statement he says that he  
10 has extensive experience of dealing with MTIC fraud. His statement is lengthy, principally covering the nature and features of MTIC fraud, and the measures adopted by HMRC to attempt to combat it. He comments on the grey market in products in general terms, based largely on experience with mobile phones, and not the components concerned in this appeal.

15 **Discussion**

13. Mr Margolin drew my attention to the judgment of Lightman J in *Mobile Export 365 Limited anor v Revenue and Customs Commissioners* [2007] EWHC 1737 (Ch) (another MTIC fraud case). Mr Justice Lightman makes it clear that (at [20]):

20 "The presumption must be that all relevant evidence should be admitted unless there is a compelling reason to the contrary."

14. Accordingly, I should first consider whether the evidence of Dr Findlay is relevant. If I decide that it is, and should therefore in an ordinary case be admitted, I need then to go on to determine if there is a compelling reason why it should not.

*Relevance*

25 15. Mr Popplewell argued that Dr Findlay's evidence was not relevant. He referred to the grounds set out in the Respondents' application for permission to serve Dr Findlay's witness statement (which I have set out above). This firstly refers to the evidence contained in the witness statement of Mr A J Rayer, for the Appellant, at paragraphs 36 to 47. Mr Popplewell argued that these paragraphs focussed on the  
30 history of the commencement of the trade and the trading relationships of the Appellant. There is nothing in Dr Findlay's witness statement that bears on those paragraphs in Mr Rayer's statement.

16. Mr Margolin argued that, taking Mr Rayer's evidence as a whole, Dr Findlay's evidence can be seen clearly to be relevant. He referred to other passages from Mr  
35 Rayer's witness statements that refer to the components that are addressed by Dr Findlay's statement, the manner of trading in those components and the commerciality of the arrangements, and the way in which the grey market operates in a broker industry. All of these matters, he argued, are relevant to be addressed by Dr Findlay's evidence.

17. I have some sympathy for Mr Popplewell's criticism of the grounds for the application in this respect, as I cannot see how Dr Findlay's witness statement can be related specifically to paragraphs 36 to 47 of Mr Rayer's statement. But I agree with Mr Margolin that, looking at Mr Rayer's statement as a whole, the witness statement of Dr Findlay is clearly relevant to the issues raised there.

18. The second element of the grounds for the Respondents' application is that it will enable the Respondents to adduce further evidence concerning two products (the Astra ADC and the Astra ASI) in which the Appellant traded during the relevant VAT accounting periods. In fact, as well as providing analysis in respect of those components, Dr Findlay's witness statement also deals with two other components not referred to in the grounds for the application, namely the Intel P4 and the Maxtor 80GB. Mr Popplewell argued that, to be relevant, the witness statement of Dr Findlay had to be relevant to the Respondents' pleaded case. The Respondents filed an amended Statement of Case on 25 November 2008. This included for the first time allegations regarding the Astra ADC and the Astra ASI. These changes to the original Statement of Case resulted from the evidence of Mr Coughlin. There is nothing in the amended Statement of Case that is specific to the Intel P4 or the Maxtor 80GB.

19. In this respect Mr Margolin said that, if the Respondents' application were to be successful, it would be intended that before the end of September 2009 the Respondents would make an application to file a re-amended Statement of Case.

20. It does not seem to me that the absence of specific allegations in the current amended Statement of Case to the Intel P4 or the Maxtor 80GB can affect the question of the relevance of Dr Findlay's witness statement in those respects. The transactions in question are referred to and the components in question are all identified in Annex C (Deal Sheets for Appellant's Deal Chains) to the amended Statement of Case. The evidence in Dr Findlay's witness statement is relevant to those transactions and consequently relevant to this appeal.

#### *Expert evidence*

21. Mr Popplewell argued that Dr Findlay's evidence fell to be regarded as a combination of expert evidence and evidence of fact. He submitted that the evidence contained in the witness statement that refers directly to the transactions in question and comments on their reasonableness in terms of "normal business practice" exceeds Dr Findlay's brief as an expert on the electronic components market.

22. Mr Margolin referred me to the judgment of Sir Andrew Park in *Mobile Export anor v Revenue and Customs Commissioners* [2009] EWHC 797 (Ch). This concerned appeals from further interlocutory Tribunal decisions in the same cases as were dealt with at an earlier interlocutory stage in the judgment of Lightman J referred to above. One of those decisions was to admit evidence of a KPMG employee, Mr Taylor, in relation to the market in mobile phones, which were the products concerned in the transactions that were the subject of the main appeals. One of the arguments against the admission of Mr Taylor's evidence was that he was not

an expert. Sir Andrew Park referred to rule 28 of the Value Added Tax Tribunals Rules 1986 (“the 1986 Rules”), and said (at [17](2)(b)):

5 “This rule is not an open sesame for any party to an appeal to call anyone to give evidence on anything. It does however relax, and in my judgment is intended to relax, some of the more rigid evidential rules which can arise in High Court proceedings. I do not accept the submission that the rule comes close to being a one-way option in favour of appellants. If HMRC wish to adduce in evidence a competent and informative analysis of a sector of business and of an appellant’s activities within it, rule 28(1), in my judgment, enables them to do that without having to meet technical arguments about whether the witness does or does not strictly rank as an expert.”

15 23. The 1986 Rules ceased to have effect from 1 April 2009 and have been superseded by the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009. Although this appeal was before the Tribunal before 1 April 2009, and thus subject to transitional provisions, no application was made for the 1986 Rules to apply in this respect. The relevant provision can therefore now be found in rule 15(2) of the Rules, and this is one of the rules on which the Respondents based their application. It has similar effect to rule 28 of the 1986 Rules, and provides:

20 “The Tribunal may ... (a) admit evidence whether or not the evidence would be admissible in a civil trial in the United Kingdom”

25 In the *Mobile Export* case, Sir Andrew Park held that the categorisation of the evidence of Mr Taylor as expert or not did not matter. In this case I consider that the same can be said of the evidence of Dr Findlay. In my view no technical objection should prevent the Respondents from adducing in evidence a competent and informative analysis of the business sector concerned in the Appellant’s appeal. The Tribunal that hears the substantive appeal can make its own judgment, after hearing the evidence and cross-examination, of the weight it will attach to the analysis by Dr Findlay of the Appellant’s transactions, but that does not make Dr Findlay’s evidence irrelevant or provide any reason why it ought not to be admitted.

### **Other compelling reasons?**

35 24. Mr Popplewell put forward three further reasons why in his submission the witness statement of Dr Findlay should not be admitted. They included an argument based on cost, and an argument that the Appellant would be prejudiced. In each of these cases, however, Mr Popplewell withdrew his submissions in the course of argument, and I shall not refer further to these points in this decision.

40 25. Mr Popplewell’s third, and only remaining, reason why Dr Findlay’s evidence should not be admitted was that in large part it covered much the same ground as that covered by other witnesses for the Respondent (Mr Coughlin and Mr Stone, the nature of whose evidence I have summarised above). Mr Popplewell referred to the fact that Mr Coughlin’s evidence relates to price and lack of description of the products on invoices, areas he said are duplicated in Dr Findlay’s witness statement. He argued

that both Mr Coughlin and Mr Stone provide evidence as to the grey market, which covers much the same ground as that addressed by Dr Findlay.

26. Mr Margolin argued that Dr Findlay's witness statement covers more ground than that covered by Mr Coughlin and approaches the relevant matters from a different perspective to that of Mr Coughlin. As regards Mr Stone's evidence, this is more general in nature on the grey market in mobile phones. By contrast, Dr Findlay's witness statement is more targeted on the grey market in the particular components concerned in the transactions that are the subject of this appeal.

27. I agree with Mr Margolin. There may be some overlap in the evidence of Dr Findlay with that of Mr Coughlin and Mr Stone, but, in my view, having considered the witness statements of all three, it is modest and to the extent there is any it is more in terms of subject matter than in terms of substance. It is correct that Mr Coughlin, like Dr Findlay, considers the Astra ADC and Astra ASI components, but he does so from a technical perspective whereas Dr Findlay approaches the components more from a market viewpoint. In the case of Mr Stone's evidence, this for the most part covers very different ground to that in Dr Findlay's witness statement, and although in paragraphs 142-153 of Mr Stone's witness statement (to which Mr Popplewell especially referred me) Mr Stone considers the grey market, he does so in generality, and largely by reference to the market in mobile phones. By contrast, Dr Findlay's statement considers the grey market with specific reference to components of the nature in question in this appeal. There is no material overlap of substance between the evidence of Dr Findlay and that of Mr Coughlin or Mr Stone. Dr Findlay's evidence is not duplicated, and so this cannot be a compelling reason why Dr Findlay's witness statement should not be admitted.

## 25 **Directions**

28. For these reasons I direct as follows:

(1) The Respondents' application dated 30 July 2009 is allowed, and the Respondents have permission, not later than 14 days after the release of this decision, to serve on the Appellant and on the Tribunal (without exhibits) the witness statement of Dr Kevin W J Findlay in the form produced to the Tribunal on this application.

(2) Within 2 months of the service of Dr Findlay's witness statement on the Appellant, the Appellant may serve on the Respondents evidence in reply to that witness statement (copy to the Tribunal without exhibits).

(3) Not later than 30 September 2009 the Respondents shall serve on the Appellant and on the Tribunal further particulars of the Respondents' case in relation to the Intel Pentium 4 630 775 slot Retail Boxed component and the Maxtor Diamond Max10 Hard disk drive 6L080L0.

(4) Liberty to apply.

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**ROGER BERNER**

**TRIBUNAL JUDGE**  
**RELEASE DATE: 6 May 2010**

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