



The Khan Partnership LLP, 48/49 Russell Square, London WC1B 4JP
t: +44 (0)20 7612 2530 f: +44 (0)20 7612 2531 e: info@thekhanpartnership.com
DX 337 LONDON CHANCERY LANE
www.thekhanpartnership.com

BRAYFAL T/A DRK - v – HMRC

HM Revenue & Customs' Appeal to the High Court dismissed on all grounds – March 2008

The Khan Partnership LLP have successfully fought against HMRC's appeal to the High Court in London, which they brought against a decision of the VAT & Duties Tribunal refusing to allow HMRC to adduce further evidence during the hearing of an appeal by *Brayfal Limited t/a DRK* in Manchester in January 2008.

Mr Justice Lewison immediately handed down Judgment on 4 March, 2008. After a two day hearing before him in the High Court, he dismissed HMRC's appeal on all six grounds. He stated in summary; "I find it impossible to say that the Tribunal have made an error of law ". He ordered HMRC to pay Brayfal 100% of its costs in relation to the High Court Appeal.

The Judgment provides useful commentary on the importance of proper disclosure by the HMRC both generally and particularly in relation to MTIC matters and demonstrates the effectiveness of the pro-active and robust approach taken by The Khan Partnership LLP (formerly Hassan Khan & Co Solicitors) of repeatedly forcing the Commissioners' compliance with Tribunal directions and the need for proper and early disclosure of the cases traders are required to answer to.

In finding against HMRC, the High Court stated that "*The documents sought to be relied on are documents that HMRC wishes to rely on in support of its positive case, so the failure to disclose is a plain breach of the Rules and of every direction that the Tribunal has made about the disclosure of documents. In so far as this provides any explanation for the failure to comply with the Rules or the directions, it is a wholly inadequate explanation.*"

HMRC's attitude of ignoring Tribunal directions and the clear provisions of the *VAT & Duties Tribunals Rules* (that require the fair and timely disclosure of documents a party intends to rely on) cannot prevail. Furthermore, applications for extensions of time by the Commissioners must provide proper reasons as to why an extension is sought; "pressure" in the Commissioners' Solicitor's Office is not a proper reason and it is clear that the Courts will not now accept it as such. Forcing the Commissioners to comply with the *VAT & Duties Tribunals Rules* (which they themselves drafted) and taking a modern case management approach requires a proactive and clear case strategy and a robust approach. It is clear that such an attitude and approach is crucial to progressing complex cases.

Mr Justice Lewison made reference to how *“modern case management attaches importance to a cards-on-the-table approach. It discourages surprises and ambushes.”*

In *Commissioners of HMRC v. Dempster*, [2008] All ER (D) 175 (Jan), the Tribunal emphasised the importance of “fairly and squarely” pleading serious allegations of dishonesty made against a party and these allegations “fairly and squarely being put to the witness in cross-examination.” This approach involves taking positive steps at every point of the proceedings to push the Commissioners to properly particularise their allegations, provide proper complete disclosure of all documents relevant to the appeal that both harm and help the Commissioners’ case, and keep the Commissioners’ to the Tribunal timetable.

The balanced and objective decision of the Tribunal in *Brayfal* to not allow further evidence to be adduced by the Commissioners mid-way through the main appeal hearing itself sends a strong message to HMRC; a message made stronger by the High Court’s total endorsement of the Tribunal’s decision. It is clear, and now endorsed by the High Court, that HMRC must make proper disclosure of all documents relevant to the Appeal within good time to enable the Appellants in these cases to properly prepare for the appeal hearing.

The High Court found the submissions put forward for *Brayfal* by its lawyers to be compelling and openly criticised the Commissioners’ “catalogue of errors” in relation to their ‘piece-meal’ disclosure and agreed with the Tribunal’s comments that “enough is enough” in HMRC’s disregard of Court rules and the spirit of proper, open case disclosure.

On 30 January 2008, the VAT Tribunal in Manchester had made a formal, written decision, not permitting HMRC to bring in further evidence to support the “relevant” tax loss chains in the contra-trading chains that had allegedly occurred, which it is common ground, *Brayfal* was not aware of, which have been “randomly allocated” to *Brayfal* by HMRC.

The Tribunal reached the decision on a number of bases after finding that the Commissioners had had more than enough opportunities to perfect the evidence to support their case. It also found that *Brayfal* would suffer significant prejudice were the documents to be admitted given that the substantive hearing had already been in progress for some 12 days when the Commissioners made their application to introduce further documents.

The Commissioners appealed the Tribunal’s decision to the High Court on six grounds, all of which were dismissed in full by the High Court. The Judgment provides critical guidance regarding the test for proper disclosure and the importance of enforcing modern case management principles.

Mr Justice Lewison stated that:

“Modern case management attaches importance to a number of different factors. First, it attaches importance to compliance with orders and directions. Failure to comply with orders and directions increases the costs to the parties, delays the final adjudication on the merits and requires the devotion of proportionately more time of the Tribunal to the case in question. Failure to comply with orders and directions is prejudicial to the administration of justice itself”.

It is precisely this prejudice which HMRC continue to exploit at the expense of taxpayers. This Judgment sends a clear message to the Commissioners that this will not be tolerated, as the High Court said, “In other words, the Tribunal decided that "enough was enough".

This case has a serious impact on all MTIC and similar cases before the VAT Tribunal and directly affects and reduces the medium term effectiveness of HMRC's tactics of slow, stalling and piecemeal disclosure and unwillingness to lay their cards on the table with clear evidence and allegations that taxpayers can properly prepare for and respond to.

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If you would like further information, please contact Caroline McTavish at The Khan Partnership LLP.

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