[2019] UKFTT 0646 (TC)

TC07421

PROCEDURE – application for expedition – test – whether sufficient evidence – expedition ordered and directions given

FIRST-TIER TRIBUNAL
TAX CHAMBER

number: TC/2018/06208

BETWEEN

IMPACT CONTRACTING SOLUTIONS LIMITED **Appellant**

-and-

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

TRIBUNAL: JUDGE BARBARA MOSEDALE

Sitting in public at Taylor House, London on 24 October 2019

Mr T Brown, Counsel, instructed by Duncan Lewis Solicitors, for the Appellant

Mr J Carey, counsel, instructed by the General Counsel and Solicitor to HM Revenue and Customs

DECISION

INTRODUCTION

1. The appellant appeals against a decision of HMRC of 16 September 2019 revoking its VAT registration. The decision was made under the doctrine in *Ablessio* C-527/11 on the basis that HMRC considered that the appellant was using its VAT registration solely or principally for fraudulent purposes.

2. The appeal was lodged on 20 September 2019 and on 30 September the appellant applied for it to be expedited. An expedited hearing to consider the application was therefore called.

THE LAW

3. The parties appeared agreed that what I said in *Manhatten Systems Ltd* [2017] UKFTT 862 (TC) about expedition of hearings was correct. I had said:

> 6. I understood expedition to mean either or both:
>
> (1) As short as possible time consistent with justice permitted to the parties to prepare the case for hearing, with a presumption against extensions of time being granted for compliance;
>
> (2) An early hearing with the expedited case prioritised for listing over other cases within the Tribunal system.
>
> 7. The appellant relied on the case of *CPC Group Ltd* [2009] EWHC 3204 (Ch). The judge there summarised the law on expedition saying that [88] the applicant must satisfy the court of 'objective urgency' and that was a 'high threshold' [87]. He also said that 'the respondent's attitude is not really of importance. It is only if he can show some real prejudice to him if a trial is expedited that he has a part to play' [89] although the judge also said the respondent could make representations on whether or not expedition was justified.

4. The parties were not entirely agreed on what this meant. Mr Carey referred me to what was said by the Court of Appeal in *ABC Ltd and others* [2017] EWCA Civ 956 at [85] on the basis that test for urgency when applying for injunctive relief in judicial review proceedings was much the same as for an application for expedition; Mr Brown did not agree. (I note in passing that when applying for injunctive relief, the appellant would have other tests to satisfy, such as showing its case was of sufficient strength, but no one suggested that there was a similar test for expedition and I do not consider it.)

5. The urgency test stated in *ABC* was:

> A claimant seeking an injunction would need compelling evidence that the appeal would be ineffective. It would call for more than a narrative statement from a director of the business speaking of the dire consequences of delay. The statements should be supported by documentary financial evidence and a statement from an independent professional doing more than reformulating his client's stated opinion. Otherwise, a judge may be cautious about taking prognostications of disaster at face value. It should not be forgotten that a trader who sees ultimate failure in the appeal would have every incentive to talk up the prospects of imminent demise of the business, in an attempt to keep going pending appeal. ……

It can be seen that this statement combined two elements which were (a) the legal test for urgency and (b) the nature of the evidence required to prove it. I will consider each in turn.

6. Mr Brown's position was that the test for urgency in injunctive relief proceedings was not the same as the test for expedition in the tribunal because their purpose was different. In

the JR proceedings, the appellant would be seeking temporary suspension of HMRC's decision so that it was spared the immediate effect of that decision: it is not surprising it needs compelling evidence that without the injunction its right to appeal would be rendered nugatory ('…compelling evidence that the appeal would be ineffective…'). Mr Brown implied the test should be less onerous for expedition of the appeal hearing.

7. I accept that, although a decision to expedite an appeal does impose burdens (on the other party, the Tribunal and other litigants), it does not involve reversing a decision of HMRC ostensibly taken in performance of their public law duty. Nevertheless, in an application for expedition the appellant must prove objective urgency. It may be possible to justify expedition on grounds other that there is a real likelihood of serious irreversible damage before the appeal is heard, but in this case that was the objective urgency which the appellant actually sought to prove.

8. And as for what evidence is required to satisfy the test, the Court of Appeal gave a clear indication that, in the absence documentary and expert financial evidence, a court should be reluctant to accept non-independent predictions of imminent business failure. What I understood this to mean was that a court should be sceptical of unsupported evidence, particularly just affidavit evidence, of an interested party. It did not mean that the Tribunal could not accept such evidence.

9. I agree with Mr Brown that it is not essential for an appellant to provide documentary and expert evidence of likely business collapse; I could accept oral evidence of director.

THE DISPUTE AND BACKGROUND

10. The appellant was incorporated and registered for VAT from 2015. Its customers were temporary work agencies; and its suppliers (or outsourcers) were some 3,300 mini umbrella companies ('MUCs'), which supplied labour. The appellant charged its customers VAT at the standard rate and was charged VAT at the standard rate by its suppliers. Its mark up was 1-4%.

11. HMRC commenced an investigation into the appellant's VAT affairs in May 2018. Some documentation was provided by the appellant to HMRC and correspondence passed between the parties. On 3 May 2019, HMRC informed the appellant it was VAT deregistered with immediate effect. The appellant appealed the decision and applied for an expedited hearing in the Tribunal. That was listed before me on 28 May 2019; at the start of the hearing HMRC announced that they had withdrawn the decision. I allowed the appeal.

12. Further correspondence passed between the parties. But on 16 September 2019, HMRC again informed the appellant that its VAT registration was immediately revoked. By the same letter, HMRC assessed the appellant to recover over £46 million in input VAT for the period 01/16 to 04/19 on the basis that (allegedly) its transactions were connected to fraud and it knew or ought to have known that.

13. The allegation at the root of the assessment and de-registration was that the arrangements between the appellant and the MUCs were contrived with the effect that the MUCs failed to properly account for VAT on their supplies to the appellant. In other words, the allegation was that the arrangements were contrived by the appellant so that the appellant purchased its supplies from defaulters. As I understand it, there is no suggestion of MTIC or carousel fraud: HMRC allege that the appellant controls the MUCs (with a view to evading VAT) but HMRC do not suggest that the appellant's supplies to its customers are contrived or other than at arm's length.

14. The decision to deny the input tax is not (yet) under appeal as it is currently being reviewed by HMRC. But it may well be that an appeal against that decision will one day be consolidated with this appeal.

15. I also mention that since lodging this appeal, the appellant has commenced the High Court's pre-action protocol for permission to judicially review, and to seek immediate injunctive relief from, HMRC's decision to remove its registration. It is applying for its VAT registration to be temporarily restored pending the JR and/or its appeal to this tribunal.

THE BASIS OF THE APPLICATION AND HMRC'S OBJECTION TO IT

16. The appellants case is that the removal of the VAT registration has had two interconnected, serious effects on its business such that it is facing insolvency:

> (a) Many of its customers will no longer trade with it as the loss of the VAT registration has damaged its reputation;
>
> (b) It cannot trade profitably because its profit margin cannot cover the increase in price necessary to absorb its now irrecoverable input VAT.

These factors, it said, justified expedition of the appeal.

17. HMRC's position was that the appellant had failed to evidence its case that expedition was required because it would otherwise go out of business before its appeal was resolved; furthermore, HMRC said that expedition was prejudicial to them as some £46 million was at stake in a case involving an (allegedly) complicated VAT fraud involving over 3,000 companies. HMRC bear the burden of proof and needed time to properly prepare their tribunal case.

THE FACTS

18. The evidence largely concerned the appellant's current financial status but I mention first, as it is relevant, my findings in respect of an information notice issued to the appellant.

Information notice

19. An information notice was issued to the appellant on 20 June 2019. On 25 June, the appellant asked for a statutory review of it. On 18 September (two days after this appeal was lodged), HMRC's review officer in large part upheld the notice but varied a few of the requests. One of main changes he made was to accept the appellant's point that some of the information required had been wrongly designated as statutory records; but he required it to be produced anyway on the grounds it was reasonably required for the purposes of checking the appellant's tax position.

20. The appellant provided some 11,000 documents in response to the notice by the deadline of 23 October (the day before the hearing). I accepted that, at that time of the hearing, HMRC were in no position to say whether or not the information notice had been fully complied with, let alone analyse the information provided.

The accounts

21. The Tribunal was provided with the appellant's accounts to the year ended 31 March 2018, which were signed in August 2018. They showed that the company had grown by 115% from the previous trading year to a turnover of £110 million. It also showed that the business had a very narrow profit margin of about 2%, but, because of its very high turnover, was very profitable (post tax profit of £455,000).

22. It did not provide the accounts for the year to 31 March 2019, not even in draft form.

The cashflow forecast

23. Mr Brown applied for permission to rely on two documents at the outset of the hearing which he had only handed to Mr Carey that morning; Mr Carey did not object to one but he did object to a single page cashflow forecast, which had been prepared by the appellant's in-house accountant (Ms Tate) the day before and who was not in the tribunal to answer questions about it and had not provided any of the underlying information on which it was based.

24. I admitted the document; the hearing was called at short notice to consider an application for expedition and I considered it right to overlook the fact the document was produced only the day before; the criticisms HMRC had to make of the document could affect the weight placed on it but did not prevent me admitting it.

25. The appellant's witness (Ms Corrigan) even accepted that the forecast was wrong to show the company would pay a dividend of £100,000 next month; her explanation was that the dividend had been planned which was why Ms Tate had included it in the spreadsheet, but with the company's de-registration difficulties, she and her fellow shareholder-director would not take the dividend.

26. I agreed little weight could be placed on the precise figures in the document, for the reasons given above. Nevertheless, for much the same reasons as given in [35] below, I accepted that the much- reduced income indicated by the forecast must be at least approximately right. It showed a much-decreased weekly income (compared to its accounts) down to £22,000 per week and continuing PAYE and VAT expenses that would eat into its current balance of about £300,000. The forecast predicted that the company would be in an overdraft position by the end of November 2019, with the overdraft thereafter increasing; this was overly pessimistic even on the figures in the forecast as the dividend would not be taken.

Witness evidence

27. Ms Gail Corrigan was one of the two directors and shareholders of the appellant and the only witness. She made two witness statements, one dated 2 October and the other dated 11 October 2019. A significant part of the witness statements complained about the manner of HMRC's investigation: Mr Carey said HMRC did not accept the criticism but did not cross - examine her on it as it was not relevant to today's hearing.

28. Mr Carey's position was that Ms Corrigan was exaggerating the company's difficulties. He suggested her evidence unreliable. He pointed out to her that her first witness statement said that she thought HMRC's withdrawal of its original decision 'vindicated' her, when, he said, she could not reasonably have thought this, as the day after HMRC sent a letter stating that HMRC still considered that the appellant's trading patterns indicated contrived arrangements aimed at creating loss to Exchequer and that its VAT registration status would be kept under review.

29. He said her evidence was unreliable not only because she was (he said) prone to exaggeration but because it was not backed up by documentary evidence; neither witness statement named any customer who had refused to continue to deal with the appellant.

30. Her evidence was that the company had been making gross sales of £500,000 per week but that this had dropped to £160,000 per week; this represented a loss of about 81% of its business and, she said, the revenue was continuing to drop. (I note that the £22,000 in the cash flow forecast was *net* weekly income so the evidence was not inconsistent).

31. She accepted that she had not approached a bank for financial assistance even though the company had so far operated with no overdraft and had been perceived by independent specialists to be so successful it had very recently been given an award by the London Stock Exchange. Her view was that no bank would offer financial support to a business, howsoever

preciously successful, which had had its VAT registration cancelled because HMRC alleged it was involved in fraud.

32. In her first witness statement she had predicted that the company would be insolvent within 14 days: that prediction was clearly overly gloomy as even the cashflow forecast (particularly when adjusted by deletion of the dividend) indicated the company still had about a month of solvency left and, moreover, the company was still trading at the date of the hearing.

33. Her oral evidence was that the company's largest client (Acorn) had dropped them; moreover, many of its smaller clients had decided not to put new starters with them, which meant that they remained clients only for existing workers. She said the company had 1,000s of smaller clients and she was unable to name any off the top of her head.

34. In answer to a question from her own counsel, Ms Corrigan said that she did not know how long the business could go on for.

Conclusion on Ms Corrigan's evidence

35. While I see the force of HMRC's criticisms that the appellant's case lacked documentary or independent financial evidence, I considered Ms Corrigan's evidence on the company's financial position to be very plausible. Her prediction of immediate insolvency was overly pessimistic, but I accepted the general thrust of her oral evidence: as HMRC appear to accept, the appellant trades with a very small margin where its costs are subject to VAT, and moreover it trades with clients whose concern will be with net price. Logic therefore indicates it must keep its net prices at existing levels by absorbing all its (now) irrecoverable input tax or it must significantly increase net prices. Neither option would give the company much longevity even though I do not put much reliance on the suggestion in the cash flow forecast that it will be insolvent before Christmas.

36. I also accept Ms Corrigan's evidence that the reputation of the appellant is damaged by its inability to provide a VAT number to its clients and that that as well will erode its client base.

37. The appellant has chosen not to approach a bank to help it out of its difficulties, but I agree with Ms Corrigan and Mr Brown that common sense suggests that no bank would be prepared to bankroll the appellant in its current difficulties (at least not without undertaking a time-consuming and extensive investigation to satisfy themselves, if they could, that there was nothing untoward in the appellant's business model).

38. Therefore, I find that losing its VAT registration has resulted in a very significant and on-going loss of trade by the appellant as its customers desert it; nevertheless, it is not yet insolvent. As Ms Corrigan herself said, the position is fluid and she could not say when the company would actually cease trading.

DECISION

39. Applications for expedition based on imminent business failure might put an appellant in a dilemma; there may be the risk of proving too much. If I was satisfied that business failure was all too imminent, there would seem little point in ordering expedition if, even when expedited, it is simply not possible for an appeal be heard before the business will fail. On the other hand, if the appellant proves too little, I may not be satisfied that expedition is necessary on the basis the appellant is able to hang on in until the appeal is resolved in a normal time frame.

40. Here I accept that the loss of its VAT registration has created extremely difficult trading position for the appellant and I accept it is at real risk of going insolvent before its appeal is

heard. Despite the paucity of the documentary, and absence of expert, evidence, I accept that it has proved objective urgency.

41. Mr Carey's view was that if I allowed this application for expedition, bearing in mind it was supported with so little hard evidence, it would be tantamount to saying that every appeal against loss of VAT registration should be expedited. My answer to that is I think expedition is likely to be justified where it is proved that the appellant is still trading but at real risk of going insolvent before the hearing of its appeal against the decision which has caused the financial problems. Moreover, HMRC should not be surprised if appeals against decisions to revoke VAT registrations on the grounds of fraud are often expedited where it is found that the effect of HMRC's decision is that the trader is put at risk of insolvency.

42. I recognise it is HMRC's position is that the appellant is using its VAT registration for fraudulent purposes and (says HMRC) expedition of the appeal will deny them the opportunity to prove this. My view of this, as stated at [3] above, is that expedition means that the appeal should only be progressed and heard as fast as is consistent with both parties having a fair hearing. That it seems to me, is a complete answer to HMRC's objection to expedition on the grounds of prejudice: HMRC will be given the necessary time to prepare their case for hearing.

43. Expedition should not be ordered unless justified as it does put a strain on the parties' and tribunal's resources and can delay the hearing of other appeals: but here I have found it is justified and should be ordered.

44. However, expedition does not mean the hearing will be tomorrow. Both parties will need time to prepare. HMRC ought already possess the evidence it relied on to remove the appellant's registration and should not need time to carry out an investigation; nevertheless it does need time to marshal its evidence and consider the appellant's recent disclosure. But expedition does mean both parties will have to properly resource their case preparation, so that matters can progress faster than normal.

45. I am also conscious that the appellant could already have done more to expedite this matter; it only complied the day before the hearing with an information notice issued in June. It must live with the consequence of its action, which is that HMRC will need time *now* to consider the 11,000 documents which the appellant could have provided so much earlier.

APPROPRIATE DIRECTIONS

46. I will therefore order that this appeal is expedited; quite what that means in terms of directions for this appeal is not so clear.

Grounds of appeal

47. It is clear, however, that the appellant must amend its grounds of appeal. Mr Carey did not suggest HMRC would object to such an amendment: on the contrary he regarded it as essential and I agree.

48. The current grounds of appeal complain extensively about how HMRC conducted investigation and the reasons (or alleged lack of them) for its decision to remove VAT registration. The appellant (and HMRC) accept that what I said (at [36-45]) in *Manhattan* about the tribunal's jurisdiction in *Ablessio* cases was correct and in particular I was right to say the Tribunal has full appellate jurisdiction. So Mr Brown accepted that the Tribunal would not consider the reasonableness of HMRC's conduct and decision; it would decide whether the decision was right on the basis of the evidence before the Tribunal.

49. Only one of the appellant's existing grounds of appeal was based on the *Ablessio* test and even then it was on the basis that HMRC had applied the test incorrectly. In conclusion, the entirely of the appellant's grounds of appeal must be revisited and they must be amended before

HMRC is obliged to deliver its statement of case. Mr Brown suggested he could do this within 24 hours and so I direct he should deliver the amended grounds of appeal to HMRC and the Tribunal within 7 days.

Statement of case

50. HMRC were warned on 10 October that they should be prepared to deliver their statement of case within 60 days (by 9 December 2019). This is a tight deadline in a complicated case when the grounds of appeal are to be amended and the appellant has just provided 11,000 documents: but as it is an expedited matter, I see no reason to disturb the due date for the statement of case unless the parties agree otherwise.

Further directions

51. The parties should seek to agree directions for disclosure of evidence, listing and bundles; agreed draft directions should be provided to the Tribunal within 7 days. If they are unable to agree directions, each side's proposed draft directions with reasons should be provided to the to the Tribunal and each other instead, and by the same deadline.

52. Expedition means that the parties should seek to co-operate but it does not prevent the Tribunal ordering disclosure: both parties should provide the other with the disclosure that the Tribunal is likely to award and should not seek disclosure that is unlikely to be ordered.

53. There was brief discussion of the suggestion that the case would be resolved on the basis of samples: this was HMRC's proposal and Mr Brown appeared to agree with it. Samples would reduce time for case preparation, and if a representative selection was chosen, should not impact on the fairness of the proceedings. As part of their draft directions, therefore, the parties should seek to agree the number of MUCs in respect of which evidence is to be produced by HMRC and how they are to be selected.

RIGHT TO APPLY FOR PERMISSION TO APPEAL

54. 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.

BARBARA MOSEDALE
TRIBUNAL JUDGE

RELEASE DATE: 25 OCTOBER 2019