[2017] UKFTT 0599 (TC)

TC06041

Appeal numbers: TC/2014/05870
TC/2015/00425

PROCEDURE – Late application for HMRC to be barred from taking part in proceedings – Whether to admit application – No – BPP Holdings Ltd v HMRC applied

FIRST-TIER TRIBUNAL
TAX CHAMBER

AWARD DRINKS LIMITED (in liquidation) **Appellant**

- and -

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

TRIBUNAL: JUDGE JOHN BROOKS

Sitting in public at Taylor House, Rosebery Avenue, London EC1 on 31 July 2017

Joseph Howard, Counsel, instructed by TT Tax, for the Appellant

Brendan McGurk, Counsel, instructed by the General Counsel and Solicitor to HM Revenue and Customs, for the Respondents

DECISION

1. Having set out the background to these appeals in my decision released on 22 June 2017 (see *Award Drinks Limited (in liquidation) v HMRC* [2017] UKFTT 509 (TC) at [2] – [19]) it is not necessary to do so here other than note that this was the case management hearing, listed in accordance with the directions made on 10 May 2017, to determine any interlocutory matters and ensure that the appeals proceed, as listed, substantive hearing between 20 and 28 November 2017.

2. Under directions released on the same day as the decision (22 June 2017) HM Revenue and Customs ("HMRC") were directed to provide the appellant with further and better particulars of their Statement of Case within 28 days. At the time I made that direction I was not aware that HMRC had, on 31 May 2017, responded to the appellant's application for further and better particulars and therefore did not refer to this in either my decision or directions of 22 June 2017. Although a further copy of HMRC's response to the request for further and better particulars that was filed by HMRC as an attachment to an email dated 30 June 2017 it did not prevent some confusion between the parties as to whether there had been compliance with my directions, particularly as on 8 July 2017 the Tribunal had been notified that the appellant had appointed a new representative, TT Tax.

3. In an email, dated 8 July 2017, TT Tax informed HMRC that they had been instructed and sought clarification as to whether there had been a response to the application for further and better particulars. HMRC responded by email, dated 21 July 2017, attaching a copy of their response. A subsequent email sent later the same day from TT Tax to HMRC assumed that I had seen HMRC's response to the further and better particulars when making the directions on 22 June 2017 and suggested that had the response been adequate my direction to provide the appellant with further and better particulars would not have been necessary. Later that day HMRC responded, by email, stating that they considered that I had not seen HMRC's response to the further and better particulars as it was not mentioned in my decision of 22 June 2017 and for that reason HMRC did not intend to serve anything further. On 24 July 2017, on my instruction and in response to a letter from HMRC of 21 July 2017, the Tribunal wrote to the parties to confirm that HMRC had complied with this direction.

4. At 19:34 on 25 July 2017 the appellant filed and served an application (the "Application") seeking the following directions:

> (1) That HMRC be debarred from further participation in the appeal;
>
> (2) That the decisions of the Decisions Officer and Review Officer were not made to 'best judgement' and the assessments are wholly or partly invalid as a result;
>
> (3) Further and in the alternative that HMRC be ordered to amend its amended Statement of Case, re-dated 20 March 2017 because it is now wholly inconsistent with the case that HMRC claims it is advancing as disclosed in its Response to the Further and Better Particulars and letter dated 9 May 2017 and properly plead its case by way of a re-amended Statement of Case;

(4) That in the absence of any allegation of fraud or involvement in fraud by the appellant that HMRC be ordered to remove all references in evidence and pleadings to the following matters listed in the application:

(a) All matters which allege or infer the appellant's involvement in Inward Diversion Fraud which is not expressly pleaded by HMRC;

(b) That the appellant's supplies in France were not taxable supplies;

(c) That the supplies made by the appellant in France only existed to support or lead to inward diversion fraud in the UK;

(d) That the appellant failed to register for VAT in France;

(e) That the appellant was in breach of any requirements of the Money Laundering Requirements;

(f) That the appellant's customers were not bona fides, including but not limited to whether they were in a position to deal in wholesale goods from or attract tourists to their premises.

(5) That the appellant be given permission to serve and rely on an amended or supplemental witness statement; and

(6) That documentary evidence served by the appellant regarding its supplies be treated as an indicative sample of the whole of its supply documentation.

5. However, the directions issued on 22 June 2017 required:

> "Any further application relating to the appeals to be filed and served not later than 24 July 2017, ie seven days before the case management hearing listed for 31 July 2017."

6. The Application, in almost identical terms to that of 9 November 2016 which had been considered and dismissed by Judge Dean on 19 April 2017, was clearly late. Additionally, the amended Statement of Case before the Tribunal was that admitted, in accordance with my directions on 10 May 2017 and not that dated 20 March 2017 to which the application refers.

7. For these reasons, Mr Brendan McGurk, who appeared for HMRC contends that the Application should not be admitted but that if it was it should be dismissed in any event. Mr Joseph Howard, for the appellant (which has, by email dated 27 July 2017, sought permission, "insofar as it is required", to submit the Application out of time), says that the delay would not have arisen if there had been a response from HMRC to the email of 8 July 2017 from TT Tax. He contends that HMRC's case as stated in the amended Statement of Case referred to in the application, ie that dated 20 March 2017, read together with the HMRC's letter of 9 May 2017, has no basis in law and therefore no prospect of success.

8. In the recent decision of the Supreme Court, *BPP Holdings Limited v HMRC* [2017] UKSC 55, Lord Neuberger (with whom Lord Clarke, Lord Sumption, Lord Reed and Lord Hodge agreed) referred with approval, at [25] and [26], to the guidance given by the Senior President of Tribunals in the Court of Appeal (*BPP Holdings Limited v HMRC* [2016] STC 516 that:

> 37. "There is nothing in the wording of the relevant rules that justifies either a different or particular approach in the tax tribunals of FtT and the UT to compliance or the efficient conduct of litigation at a proportionate cost. To put it plainly, there is nothing in the wording of the overriding objective of the tax tribunal rules that is inconsistent with the general legal policy described in *Mitchell* and *Denton*. As to that policy, I can detect no justification for a more relaxed approach to compliance with rules and directions in the tribunals and while I might commend the Civil Procedure Rules Committee for setting out the policy in such clear terms, it need hardly be said that the terms of the overriding objective in the tribunal rules likewise incorporate proportionality, cost and timeliness. It should not need to be said that a tribunal's orders, rules and practice directions are to be complied with in like manner to a court's. If it needs to be said, I have now said it.
>
> 38. A more relaxed approach to compliance in tribunals would run the risk that non-compliance with all orders including final orders would have to be tolerated on some rational basis. That is the wrong starting point. The correct starting point is compliance unless there is good reason to the contrary which should, where possible, be put in advance to the tribunal. The interests of justice are not just in terms of the effect on the parties in a particular case but also the impact of the non-compliance on the wider system including the time expended by the tribunal in getting HMRC to comply with a procedural obligation. Flexibility of process does not mean a shoddy attitude to delay or compliance by any party"

9. As to whether I should accede to the application of 27 July 2017, itself made after the expiry of the directed deadline, to admit the Application, as Morgan J said, at [34] of *Data Select Ltd v HMRC* [2012] UKUT 187 (TCC):

> "Applications for extensions of time limits of various kinds are commonplace and the approach to be adopted is well established. As a general rule, when a court or tribunal is asked to extend a relevant time limit, the court or tribunal asks itself the following questions: (1) what is the purpose of the time limit? (2) how long was the delay? (3) is there a good explanation for the delay? (4) what will be the consequences for the parties of an extension of time? and (5) what will be the consequences for the parties of a refusal to extend time. The court or tribunal then makes its decision in the light of the answers to those questions."

10. Clearly the purpose of the time limits is to provide certainty and avoid delay in litigation. Given the requirement, under rule 12 of the Tribunal Procedure Rules (First-tier Tribunal)(Tax Chamber) Rules 2009 that where something is required to be done "it must be done by 5pm on that day", the Application which was filed and served at 19:34 on 25 July 2017 was two days late. The reason or explanation advanced to explain the delay is that "it might have been avoided had the appellant received a reply to its email of 8 July 2017. However, as I have noted, at paragraph 3 above HMRC did respond to that email in an email dated 21 July 2017. For the purposes of this case it is not necessary to consider the consequence of granting or not

granting an extension of time, because, after hearing the arguments of both parties, as I explain below, I would have dismissed the Application in any event.

11. In the present case, although I accept that there was an element of confusion regarding the response to the request for further and better particulars, the directions were clear and unequivocal. Any application for consideration at the case management hearing listed for 31 July 2017 was to be filed and served seven days before, ie by 17:00 on Monday 24 July 2017. Not only was the Application filed after 17:00 on 25 July 2017, making it two days late, but, contrary to the guidance of the Senior President, the explanation for the delay was provided in the covering letter to the application also filed and served on 25 July 2017.

12. Given the strict approach to compliance with directions, which was confirmed by the Supreme Court in *BPP*, that the appellant has had the benefit of specialist representation who would have been aware of such an approach and that it would have been possible for the Application (as well as any application to extend time for it to be admitted) to have been made within the directed timescale I do not consider it appropriate to admit it.

13. However, having heard argument in relation to the Application, in case of any further appeal and although not strictly necessary, I shall briefly explain why I would have dismissed the Application in any event.

14. Dealing with the matters in the order raised in the Application:

1. Debarring

15. Although Mr McGurk is correct when he says that Judge Dean considered and dismissed an application that HMRC be debarred from taking any further part in the proceedings, Mr Howard explained that the present application arises out of my decision of 22 June 2017 and HMRC's responses to the further and better particulars, in particular the following:

> Request 1: Statement of Case Paragraph 1
>
> Of; "*For the avoidance of doubt, HMRC contends that the monies lodged in the Appellant's UK bank accounts relate to taxable supplies in the UK.*"
>
> Particularise:
>
> 1. …
>
> 2. In respect of each and every lodgement of monies that is alleged to related to taxable supplies made for consideration in the UK, particularise by whom and when such taxable supply was made.
>
> Response:
>
> 1. …
>
> 2. HMRC does not know the identity of those who made the taxable supplies in the UK, the consideration from which was paid into the

> Appellant's UK bank account. Nor does HMRC know the time of those sales other than the consideration from those sales must have pre-dated their deposit in the Appellant's bank account …
>
> Request 2 Statement of Case Paragraph 3
>
> Of: "*Supply chains have been traced to tax losses, and HMRC contend, instead, that the deposits related to taxable sales of goods made by on behalf of the Appellant in the UK.*"
>
> Particularise:
>
> 1. …
>
> 2. If it is alleged that the taxable supplies of goods were made in the UK on behalf of the appellant, identify by whom and when each taxable supply is alleged to have been made.
>
> Response:
>
> 1. …
>
> 2. HMRC cannot – and does not need to – identify the person who made the taxable supply in the UK or the date on which it was made.

16. Mr Howard contends that as a person cannot be liable for VAT unless he has made a taxable supply (see s 4 of the Value Added Tax Act 1994 ("VATA")) and it has not been pleaded that the appellant has made a taxable supply, HMRC should be debarred from taking any further part in proceedings under rule 8(3)(c) of the Tribunal Procedure (First-tier Tribunal)(Tax Chamber) Rules 2009 (no reasonable prospects of success) as there is no legal basis on which HMRC's case can succeed.

17. However, the responses to the request for further and better particulars cannot be read in isolation but must be considered in the context of the Statement of Case, paragraph 1 of which states:

> "HMRC made various assessments to VAT in respect of goods which they considered that the Appellant has sold/traded within the United Kingdom"

Paragraph 3 of the Statement of Case refers to:

> "… taxable sales of goods made by or on behalf of the Appellant in the UK."

Additionally, the response to "Request 4" of the further and better particulars states:

> "HMRC's case is that the Appellant's goods were only sold for consideration in the UK and that that consideration was what comprised the deposits in the Appellant's UK bank accounts. Those supplies were, to that extent, made on behalf of the Appellant."

18. Although Mr Howard or those instructing him would not have been aware, the form of the responses to the further and better particulars arises from the oral application made on 10 May 2017 by Mr Geraint Jones QC, who then appeared for the appellant, seeking clarification of the matters raised in the amended Statement of Case. He suggested in his oral application, which was subsequently made in writing,

that if HMRC were unable to identify by whom it was alleged that taxable supplies had been made on behalf of the appellant to simply say so.

19. Having noted, at [24] of my decision of 22 June 2017, that the Tribunal in its decision of 10 May 2017 had found that the amended Statement of Case "rather than representing a fundamental shift in HMRC's position clarified it", as the responses to the further and better particulars should be read in the context of that amended Statement of Case I do not consider that HMRC's case is without foundation or that further amendment to that Statement of Case is necessary.

2. Best judgement

20. As Mr McGurk points out this is a new argument that has not been included in the appellant's grounds of appeal and was not advanced before Judge Dean. However, the extent to which the HMRC Officers considered the information available before making the assessment under s 73 VATA is a question of fact for the substantive hearing rather than an application such as the present.

3. Amendment of Statement of Case

21. Although there was some argument as to whether the Tribunal had the power to direct a party to amend its pleadings, as opposed to provide further and better particulars (notwithstanding it was accepted earlier in the proceedings that the Tribunal did not have such power), it is not necessary to decide this issue. For the reasons above, in relation to debarring I do not consider that any amendment to the amended Statement of Case is necessary.

4. Removal of References to fraud in Statement of Case etc.

22. To the extent that this was an attack on HMRC's pleadings it has somewhat fallen away as a result of my observations above. In any event I consider such a "filleting" exercise would be a disproportionate use of Tribunal resources. As the Tribunal (Judges Berner and Walters QC) observed, albeit in relation to the exclusion of 'opinion' evidence in *Megantic Services Limited v HMRC* [2013] UKFTT 492 at [15] evidence:

> "… is not a matter of fact but a matter of opinion. It is merely a view of a witness on a matter on which the tribunal itself must reach its own conclusion, and as such is of no value as evidence. Such evidence may rightly be excluded on that basis. In most cases, however, we would not see it as necessary, or indeed proportionate, for a forensic exercise to be undertaken, either by the parties or by the tribunal, to identify any such matters in each witness statement and for the tribunal formally to direct that they be excluded. Generally speaking, we think that the parties can rely upon the good sense of the tribunal to disregard purported evidence that represents conclusions that the tribunal itself must reach. That can usually conveniently be the matter of submission at the substantive hearing, rather than a formal application to exclude."

23. Clearly the same approach could be taken by the Tribunal in the present case, especially having heard the submissions of the parties on the subject.

5. Amended of supplemental witness statement

24. The admission of such a statement was sought in response to a further amended Statement of Case. However, as I have concluded that this is not necessary this part of the application falls away.

6. Documentary evidence of supplies to be treated as indicative sample

25. Mr Howard refers to the hundreds of lever arch files containing information in relation to "thousands" of sales and purchases in furtherance of the appellant's trade. He says that unless there is some agreement between the parties it will be necessary for these documents to be admitted in their entirety to prevent subsequent allegations of "cherry picking". However, Mr McGurk confirmed that in the absence of any inspection, which because of the sheer volume would be disproportionate and could jeopardise the hearing dates, HMRC would be happy to proceed on the basis that a representative sample of the documents has been disclosed and accordingly would not raise any "cherry picking" allegations.

26. In the circumstances a direction, which the Tribunal could not properly make without examining the documents concerned, is neither required nor necessary.

Conclusion

27. For the reasons above the application is not admitted (and in any event would have been dismissed). The appeal shall therefore proceed to a substantive hearing, as listed, between 20 and 28 November 2017.

Appeal Rights

28. 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.

JOHN BROOKS
TRIBUNAL JUDGE

RELEASE DATE: 02 AUGUST 2017