TC02054

Appeal number:TC/2011/03991

Procedure - application for stay behind another appeal before the Upper Tribunal - criteria for stay –whether tribunal's discretion narrowed where appellant contesting stay- no- whether test to be applied is whether the decision behind which the appeal is stayed will be determinative of the current appeal- no- balancing likelihood that Upper Tribunal decision will provide assistance in current appeal against appellant's right to progress its appeal – application for stay dismissed

FIRST-TIER TRIBUNAL
TAX CHAMBER

PINEWOOD STUDIOS LIMITED **Appellant**

- and -

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

TRIBUNAL: JUDGE SWAMI RAGHAVAN

Sitting in public at Bedford Square, London on 10 April 2012

Ms Frawley, counsel, for the appellant
Mr Mantle instructed by General Counsel and Solicitor of Her Majesty's Revenue and Customs for the Respondents

DECISION

1. After hearing the application I reserved my decision. This decision sets out reasons for the determination of the application to stay this appeal behind the appeal before the Upper Tribunal in the case of *Birmingham Hippodrome Theatre Trust Limited v HMRC* [2011] UKFTT 117 (TC) ("*Birmingham Hippodrome*").

Introduction

2. HMRC apply for this appeal to be stayed behind the decision of the Upper Tribunal in *Birmingham Hippodrome.* The grounds are that the overriding objective would be best served by staying the appeal as it has core questions of law substantially similar to the questions before the Upper Tribunal. The questions of law concern s81 (3A) Value Added Tax Act 1994 ("VATA 1994"), its compatibility with EU law, and the connection between input tax deduction, taxable supplies, and output tax liability. The appellant contests the application and maintain that the core issues in *Birmingham Hippodrome* are substantially different to the core issues in this appeal.

This appeal – subject matter and stage of proceedings

3. The appellant claims for the recovery of unclaimed input tax credits. The underlying basis for the claim, which is not dispute, is that during the period 1 April 1973 to 31 July 1989 supplies made by the appellant which comprised an element of "property letting" ought to have been treated as a single fully taxable supply of studio hire at the standard rate of VAT. HMRC had, prior to the decision of the ECJ in *Card Protection Plan* (Case C-349/96) [1999] AC 601, treated that element as exempt for VAT purposes.

4. The appellant appeals against HMRC's refusal to refund the input tax that was denied in the above period. HMRC's refusal was based on the provisions in s 81(3A) VATA 1994 which they say entitle them to offset any output tax that would have been due and payable to HMRC in the event supplies had been treated as fully taxable at the material times.

5. The appellant gave further and better particulars of claim on 11 January 2012. HMRC's statement of case was due on 12 March 2012 but has not been filed pending the outcome of their application of 1 March 2012 for this stay. The appellant's further and better particulars detail various grounds of appeal which together with HMRC's points on them are discussed below where relevant.

Birmingham Hippodrome

6. The background to this case was that exempt supplies by the theatre had been incorrectly treated as taxable. The appellant claimed for overpaid output tax and HMRC relied on s 81(3A) VATA 1994 to resist this.

7. The First-tier Tier Tribunal decided s 81(3A) VATA 1994 applied. At [75] the Tribunal explained that the provision:

> "…allowed HMRC to adjust a taxpayer's claim so as to reduce it for what would (absent the provision) be out-of-time over-credited input tax…"

8. HMRC also argued that the claim should not be permitted as it was "abusive" as a matter of EU law given the link between input tax deduction, making taxable supplies and output tax liability. The principle of "abusive practices" which was invoked by HMRC was argued to go beyond situations where active steps had been taken to engineer a VAT advantage as in *Halifax v CCE* (Case C-255/02) [2006] STC 919. This wider conception of the principle was rejected by the Tribunal.

9. The First-tier Tribunal's decision also covered:

> (1) Whether the offset principle in s 81(3A) VATA 1994 was limited to claims and liabilities in the same prescribed accounting periods. The Tribunal concluded it was not so limited.
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> (2) Whether there were one or two "mistakes" for the purposes of s 81(3A) VATA 1994. That provision required there to be a single mistake governing both the repayment and the underassessment. The appellant argued that over the relevant period there were two separate mistakes consisting of HMRC's failure first to incorporate the cultural exemption into UK domestic law and second to HMRC's incorrect interpretation of Group 13 Schedule 9 VATA 1994. The Tribunal disagreed. The mistake was the failure to accord the exemption of ticket sales to UK taxpayers and there was no cause to analyse that mistake into more detailed parts.

10. The Tribunal dismissed the appeal. The appeal to the Upper Tribunal comprises an appeal made by Birmingham Hippodrome and a cross-appeal by HMRC on the abusive claim point.

HMRC's arguments

11. Mr Mantle submitted that the application of the overriding objective in the Tribunal's rule favours a stay. The core legal issues in *Birmingham Hippodrome* were substantially similar to those in the current appeal, namely the interpretation of s81(3A) VATA 1994, its compatibility with EU law and general principles on the link between input and output tax.

12. He clarified that HMRC had not made its application on the basis that there were identical questions of law (*Birmingham Hippodrome* is about taxable treatment of exempt supplies, and the set off of input tax, this appeal is about standard supplies and the set off of output tax) and it could not be denied that the facts of the two appeals were different. However, in both cases there were core issues of the application of EU law and of linking output to input tax.

13. While there was inherent uncertainty in trying to predict what the eventual reasoning in the Upper Tribunal would cover, it was highly likely that this Tribunal would be assisted in resolving issues of law in this appeal by the decision of the Upper Tribunal, a superior tribunal, in *Birmingham Hippodrome*. The likely benefit was pronounced given the absence of other authorities on s 81(3A) VATA 1994.

14. In particular it would be surprising if the Upper Tribunal decision restricted itself to narrow points on the facts and did not take the opportunity to give useful guidance on the application of the abuse of law principle, the interpretation of s81(3A) VATA 1994 and its compatibility with EU law.

15. In relation to the differences between this case and *Birmingham Hippodrome* which the appellant had highlighted the argument as to whether offset could be allowed as between claims and liabilities which spanned different prescribed

accounting periods was a more extreme argument than the issue of offset in relation to the same prescribed accounting period. It was not correct to imply that consideration of this matter in *Birmingham Hippodrome* would not be relevant. The other differences went to differences in facts but that did not change HMRC's view that it would be surprising if the Upper Tribunal gave a very narrow decision and it was highly likely that useful guidance would be given.

16. The appellant's only argument which was unique to this appeal was the argument that s 81(3A) VATA does not apply to late claims for recovery of input tax because s25-26 VATA 1994 and Regulation 29 of the VAT regulations 1995 only provide a statutory scheme to make late claims for input tax where VAT invoices are first held after the return is made for the relevant accounting period. That argument is extremely weak on the authorities (*University of Sussex v CCE* [2001] STC 1495 and *Fleming v HMRC* [2008] STC 324) and in any case any early resolution of that argument would not avoid the Tribunal having to address the core issues in the appeal.

17. The following factors were also of relevance to the Tribunal's discretion:

> (1) The fact this was not a case where HMRC were seeking a stay in the hope that the Upper Tribunal would reverse the reasoning of the First-tier Tribunal as HMRC had been successful on their points on s 81(3A) VATA 1994.
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> (2) Proceeding without the benefit of the Upper Tribunal's decision is likely to add to costs and require further time to be devoted to this appeal. It would lead to overlapping issues being litigated simultaneously in separate appeals with the risk of conflicting decisions. The Upper Tribunal decision will inevitably impact on how the parties develop and present their cases.
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> (3) The likely length of the stay. This was estimated to be 9 months or so taking into account the likely date this appeal would come to hearing and the likely date of the Upper Tribunal's decision early next year. The Upper Tribunal's contribution to resolving core issues in this appeal justified a stay for that period.
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> (4) In terms of hardship to the appellant and the impact on their business there were no implications for the current or future VAT treatment of the appellant's business. The appeal only concerns remedies which the appellant is entitled to as a result of the historic VAT treatment of its supplies before 1990. The amount in issue is about £170,000 which is a substantial sum but not when viewed in the scale of appellant's operations.

Appellant's arguments

18. On behalf of the appellant Ms Frawley submitted that where HMRC request a stay and the appellant objects, given the taxpayer's right to bring their appeal the Tribunal's discretion is narrow, and the Tribunal should proceed with caution. If the Tribunal were to order a stay that would be excessive and potentially exceed the discretion of the Tribunal.

19. Further a stay would effectively silence the appellant in respect of its important legal arguments; it would be wholly unfair, unjust and unreasonable and represent a fundamental breach of natural justice.

20. The appellant wished to proceed with its appeal and there had been quite enough delay already.

21. The context of this appeal was not the same as *Birmingham Hippodrome* and therefore would not offer guidance of use in this appeal.

22. In relation to the interpretation of s 81(3A) VATA 1994 there were a number of differences between the circumstances of the two matters. In *Birmingham Hippodrome*, a concession had been made in relation to the application of the offset principle in relation to the same accounting period, there were issues of whether the offset applied to claims and liabilities across different prescribed accounting periods and of whether there had been two "mistakes" for the purposes of s81(3A) rather than one. In contrast in this appeal no concession had been made as to the applicability of the offset to claims and liabilities in the same accounting period, there was no issue as to claims and liabilities across different prescribed accounting periods and there was only one mistake in issue.

23. Any decision on the application of the abuse of law argument would have to be considered on the facts pertinent to the particular taxpayer. The circumstances here were different. HMRC had in *Birmingham Hippodrome* referred to the economic effect of the claim. Ms Frawley submitted there was a difference between *Birmingham Hippodrome* where the taxpayer had overpaid output tax and this appeal where the supply was wrongly treated as exempt and input tax credits were under recovered. As was explained in the appellant's further and better particulars, in the former case a taxpayer would likely have records and invoices showing the amount of output tax charged and could use these to claim a corresponding deduction for input tax. This was in contrast to a taxpayer who had been operating on the basis of a supply that had been treated as exempt and who would not have issued invoices to its customers. The taxpayer would be required to account for output tax retrospectively but would not be in a position to pass this on to its customers.

24. The issue of the measure of a claim for breach of a person's Community law rights being the loss in fact sustained did not arise in *Birmingham Hippodrome* where no loss was assumed but a loss does potentially arise in this appeal.

25. The argument in this appeal that an assessment is required under s 73 VATA 1994 if HMRC wish to recover output tax due and payable from the relevant period does not arise in *Birmingham Hippodrome*.

26. None of the facts were in dispute in *Birmingham Hippodrome* whereas questions of fact may arise in this appeal.

Discussion

Tribunal's power to direct a stay

27. Under the Tribunal's case management powers in Rule 5(2)(j) of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009 ("Tribunal Rules") the Tribunal has the power to direct a stay of proceedings. Under Rule 2(3) of the Tribunal Rules the Tribunal must seek to give effect to the overriding objective when it exercises any power under the rules. The overriding objective is to enable the Tribunal to deal with cases fairly and justly. This includes according to Rule 2(1)(e) "avoiding delay, so far as compatible with proper consideration of the issues".

Relevance of appellant's objection to stay

28. The appellant argues that where the appellant objects to a stay the Tribunal's discretion is narrow or further that the Tribunal would be exceeding its discretion to grant a stay in these circumstances. As Mr Mantle pointed out no authority is given for that proposition and I disagree the discretion is limited in the way suggested or that the Tribunal would be exceeding its discretion if it were to grant a stay. Dealing with the particular circumstances of a case fairly and justly might well entail granting a stay even if the appellant objects.

29. I agree with Mr Mantle's submission that where an appellant has consented to the stay application then that is relevant to the question of assessing the impact of delay on the appellant. I would add that, even if both parties consent to a stay, that would not of itself preclude the Tribunal from deciding the stay should not be granted.

Approach to exercise of Tribunal's discretion

30. In the First-tier Tribunal's decision in *Grattan PLC (No.2) v HMRC* [2011] UKFTT 282 ("*Grattan"*) the Tribunal referred to statements by Sullivan LJ in *DEFRA v Downs* [2009] EWCA Civ 257 ("*Downs"*), suggesting that a stay is an exception rather than the rule, and that solid grounds have to be put forward. If those grounds are then established, the court must undertake a balancing exercise weighing the risks of injustice to each side if a stay is or is not granted.

31. The circumstances of *Grattan* (which concerned a stay of a reference to the CJEU behind the determination of a permission to appeal application on the Tribunal's decision to make the reference) and *Downs* (which concerned a stay of a High Court judicial review judgment) are both different to the current appeal. But, I find the approach suggested in *Downs* of requiring solid grounds for the stay to be a helpful guide and capable of more general application in so far as it is the case that with directions to stay there is the common theme of something being delayed, which but for the stay would be able to proceed in the normal way.

32. Here, the appellant, in bringing this appeal before the Tribunal, is exercising a statutory right accorded to it. The overriding objective of the Tribunal when exercising its powers under the Tribunal Rules (which is an objective the parties must help to further) includes avoiding delay so far as compatible with the proper consideration of the issues.

33. While the appellant's arguments that a stay would silence their legal arguments and would be a fundamental breach of natural justice rather overstates matters, in my view it must be recognised as a starting point that the appellant has a right to progress their appeal and further that because of the delay occasioned by a stay it is appropriate for the Tribunal to be satisfied that there are solid grounds to justify overriding that right.

Are there solid grounds for the application for stay?

34. The question arises as to what level of similarity of issues between the two matters there ought to be in considering whether to grant the stay. There are factual differences between this appeal and *Birmingham Hippodrome*. That kind of difference is inevitable and I do not think this of itself can mean that a stay is not possible.

35. One of the points of distinction the appellant highlights is that in this case facts are not agreed but in *Birmingham Hippodrome* they appear to have been. I cannot see though how that distinction takes the matter further when considering a stay behind the appeal of a First-tier Tribunal decision on points of law.

36. Further, I do not think the test governing whether a direction to stay should be given can necessarily be as narrow as considering whether the case behind which the appeal is stayed will be determinative of the appeal. Given Rule 18 of the Tribunal Rules provides for a specific regime for determinations to follow in relation to cases where there are "common or related issues of fact or law" there is, I suggest, scope for the test to be at least as broad as that both in terms of the level of commonality or relatedness required but also in that there may be benefits to the fair and just conduct of the appeal which arise even if not all of the issues in contention are determined.

37. The application is made on the basis that there are substantially similar core issues and that it is highly likely that the Upper Tribunal will provide guidance which will assist in resolving the legal issues in this case. I do not understand the appellant to be disputing HMRC's formulation but rather the application of it to the circumstances in this appeal. Establishing that there are substantially similar core issues is I think a reasonable starting point. But, what is then more important to assess, is whether the consequential impact of such similarity justifies the stay. This will involve looking at the likelihood and significance of benefits to be derived from any guidance on any substantially similar core issues by the Upper Tribunal. Those benefits will also then need to be balanced against the curtailment of the appellant's right to proceed with its appeal.

Guidance on substantially similar core issues

38. There are a number of issues wrapped up under this ground for the stay:

What is the probability of the Upper Tribunal giving guidance on wider principle rather than reaching decision on narrow grounds?

39. While I agree with Mr Mantle it would be surprising if the Upper Tribunal reached its decision on narrow grounds, it must, as Mr Mantle accepted be acknowledged that there is some inherent uncertainty in speculating on how the decision may be formulated.

Relevance of any guidance in Birmingham Hippodrome to this appeal

40. In relation to s 81(3A) VATA 1994 and the issue of whether it operates in relation to only the same prescribed accounting periods or can span different prescribed accounting periods I agree with Mr Mantle's line of argument that if the Upper Tribunal came to view the provision could apply across different account periods it is difficult to see how this would not be of relevance to a case dealing with the same prescribed accounting period.

41. In addition to the lack of a concession on same accounting periods in the instant appeal, the appellant's stronger arguments, in relation to material differences between the appeals, centre around the distinction that might be drawn from the fact this appeal is about exempt supplies that ought to have been treated as standard and that the set off in issue is against output tax that was not collected. It would not be appropriate for this Tribunal at this interlocutory stage to go into the detailed merits or otherwise of focussing on such a distinction. But, given what the appellants highlight, the applicability of any guidance given by the Upper Tribunal would clearly be in contention in so far as it concerned the type of scenario presented by the present appeal. I am satisfied that, even if the Upper Tribunal were to give guidance on a broader principle, that there would be a question mark over whether this would necessarily assist in resolving or narrowing the legal issues in this appeal.

42. Equally, in relation to arguments on the abuse of law claim, if this appeal were stayed and following Upper Tribunal decision HMRC pursued that argument in this appeal, it is clear the application of the abuse of law principle to the scenario where the taxpayer maintains it did not have a chance to charge output tax to its customers will be contested. Again without going into the detailed merits of that I am satisfied the appellants have raised a question mark over the ultimate level of assistance that might be afforded by the possible Upper Tribunal guidance.

43. The appellant's further and better particulars of claim indicate further contentions which they say would not be dealt with in *Birmingham Hippodrome*. HMRC say only one of these contentions is unique to this appeal but it is extremely weak. Given there are already reservations expressed above over the level of likely assistance that might be gained through a stay when viewed against the appellant's particular circumstances, beyond taking into account that there are further contentions where the likely relevance of possible guidance from *Birmingham* Hippodrome is disputed, I do not address each of the other contentions in detail.

Balancing likelihood and significance of the benefits of waiting for the Upper Tribunal decision against the appellant's right to proceed with appeal

44. I do not dispute that there is a likelihood of guidance, and that if such guidance is given it will be something the Tribunal hearing the case will want to consider. Further, depending on the outcome of more detailed consideration of the merits of the appellant's arguments, it is possible that the guidance may serve to narrow the legal issues. But I must weigh those possibilities against the certainty that if a stay is granted the appellants appeal, which it is keen to progress, will be delayed.

45. In assessing the likely benefits to the management and conduct of this appeal I asked for views on the impact of the stay on the shape of what evidence might need to be put forward. This was on the basis that it was relevant to consider whether this was the sort of case where waiting for the Upper Tribunal decision would prevent parties from having to adduce unnecessary evidence or whether it would reduce the risk of the parties not bringing forward evidence which subsequently proved to be necessary in the light of the Upper Tribunal decision. Mr Mantle helpfully clarified that, in particular in relation to any possible abuse of law argument, while the Upper Tribunal decision would likely effect legal arguments; this was not the sort of case where issues of evidence would be affected significantly.

46. Having taken account of the arguments put by both sides, while I accept that there is a likelihood that the decision in *Birmingham Hippodrome* will give guidance that may well be of assistance, in view of the materially different circumstances of this appeal, the likelihood of guidance, and any beneficial impact on the way the case is conducted are not in my view significant enough to outweigh the appellant's right to proceed with its appeal.

47. I have noted HMRC's submissions on the limited prejudice that arises to the appellant if a stay is granted including such matters as the likely length of delay, the amount in issue, and the historic nature of the claim. These factors may well be more relevant once it is established that solid grounds are made out for the stay but even if they are taken into account in considering whether solid grounds for the application are made out I am not persuaded that they wound swing the balance towards granting a stay. An absence of hardship or significant business impact on the appellant does not mean the appellant has any less of a right to proceed with the appeal it has put before the Tribunal.

48. I therefore refuse the application for the stay and have made other directions relating to the future progress of the appeal.

Re-categorisation of appeal to complex and transfer of preliminary issue to Upper Tribunal

49. At the hearing Ms Frawley raised the issue of whether the appeal ought to be re-categorised as complex with a view to making a request under Rules 28(1) of the Tribunal Rules to the President of the First-tier Tribunal for a preliminary issue or issues to be referred to the Upper Tribunal. Notice of this application had however only become apparent from a skeleton argument filed the night before the hearing, the preliminary issue had not been articulated in any detail, and crucially the consent of both parties which is a pre-condition to the Rule 28 referral was not established. In view of the above I did not hear the various applications and made no determination on them. I was asked by the appellant to consider the reasonableness of HMRC's lack of consent to the referral. There did not however appear to be any basis under the Tribunal Rulesg for me to do that so I say nothing further on the point.

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.

SWAMI RAGHAVAN
TRIBUNAL JUDGE

RELEASE DATE: 14 June 2012